Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BALCOR REAL ESTATE HOLDINGS, INC., f/k/a BALCOR REAL ESTATE FINANCE, INC.,

Petitioner,

v.

H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the "ordinary business terms" element of the ordinary course of business defense in the Bankruptcy Code's preferential transfer avoidance statute, 11 U.S.C. Section 547(c)(2)(C), applies exclusively to business practices used "in ordinary circumstances, when businesses are healthy".

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Balcor Real Estate Holdings, Inc. (Balcor), f/k/a Balcor Real Estate Finance, Inc., and the Respondent, H. Christopher Clark, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners, a Colorado general partnership, and Meridith Millard Partners, a Nebraska general partnership (the Trustee).

The Respondent before this Court is H. Christopher Clark, Trustee.

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BALCOR REAL ESTATE HOLDINGS, INC., f/k/a BALCOR REAL ESTATE FINANCE, INC.,

Petitioner,

v.

H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Balcor, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 28, 1993. Balcor's Petition for Rehearing was denied by the Tenth Circuit on January 20, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the decision of the United States District Court for the District of Colorado is reported at 12 F.3d 1549 and is reproduced at App. 1, *infra*. The order of the Tenth Circuit denying Balcor's Petition for Rehearing is reproduced at App. 15, *infra*. The memorandum decision of the district court affirming the decision of the United States Bankruptcy Court for the District of Colorado is reported at 145 B.R. 682 and is reproduced at App. 17, *infra*. The memorandum decision of the bankruptcy court is reproduced at App. 29, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 28, 1993. The Petition for Rehearing was denied by the Tenth Circuit on January 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This case arose under 11 U.S.C. § 547. The United States Bankruptcy Court for the District of Colorado had jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(F). The United States District Court for the District of Colorado had appellate jurisdiction pursuant to 28 U.S.C. § 158(a). The United States Court of Appeals for the Tenth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED

This case involves 11 U.S.C. § 547(c)(2). Section 547(c) is reprinted in its entirety at App. 46.

STATEMENT OF THE CASE

I. INTRODUCTION

This case began as an adversary proceeding in the consolidated Chapter 7 bankruptcy cases of Meridith Hoffman Partners (Hoffman), a Colorado general partnership, and Meridith Millard Partners, a Nebraska general partnership (Millard). Balcor, a commercial real estate lender and the largest creditor of both of the bankruptcy estates, financed two shopping center properties owned by Hoffman and Millard, respectively.

The Trustee of the bankruptcy estates brought the adversary proceeding to recover, as allegedly avoidable, preferential insider transfers, the sum of $395,851.38 in loan repayments made by Hoffman and Millard to Balcor during the one year period preceding the filing of involuntary bankruptcy petitions against Hoffman and Millard, by their general partners, on May 8, 1989.[1]

II. THE LOAN TRANSACTIONS

Lawrence Fiedler, the Meridith Organization and Gregory Rice were general partners of both Hoffman and Millard. Hoffman owned the Hoffman Heights Shopping Center in Aurora, Colorado. Balcor made a $3,550,000 mortgage loan to Hoffman on January 30, 1985. The loan was subsequently modified and the principal amount due Balcor was increased to $3,600,000. Millard owned the Millard Plaza Shopping Center in Omaha, Nebraska. On September 8, 1986, Balcor made two separate mortgage

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[1] The involuntary bankruptcy petitions were first filed under Chapter 11. The Millard and Hoffman bankruptcies were converted to Chapter 7 cases on August 6, 1990, and August 10, 1990, respectively.

loans to Millard, one in the amount of $5,000,000 and the other in the amount of $300,000. Fiedler and the Meridith Organization guaranteed the loans to Hoffman and Millard.

As part of subsequent loan modifications, Balcor and Hoffman and Balcor and Millard entered into escrow agreements which modified the loan repayment terms of the pre-existing real estate loan agreements. The Hoffman escrow agreement was effective October 3, 1986, two years and seven months before the filing of the Hoffman bankruptcy on May 8, 1989, and one year and seven months before the start of the one-year insider preference period under 11 U.S.C. § 547(b)(4). The Millard escrow was effective December 1, 1987, one year and five months before the Millard bankruptcy filing, and five months before the start of the one-year insider preference period. The Hoffman and Millard escrows were identical in all material respects. The Hoffman and Millard escrow payment procedures, once in place, were not altered by the parties before or during the preference period.

Similar escrow agreements were in place on two other Meridith-owned properties financed by Balcor, Wardway Plaza and Grand Island. Gregory Rice, a general partner of Hoffman and Millard and the president of Banc Property Services, Inc. (Banc), the property manager for both shopping centers, testified at the bankruptcy court trial that, of the eight or nine other Meridith-owned properties managed by Banc and not financed by Balcor, at least two had escrow agreements in place. Rice testified that such escrows were used with some frequency in those parts of Colorado where Banc had done business. Rice also testified that, in his experience, developers entered into such escrow agreements when lenders wanted more "comfort level" that revenues generated by properties were not being diverted and that the property securing the loans was being maintained.

Daniel A. Duhig, Balcor's First Vice President, gave unrefuted testimony that Balcor entered into the Hoffman and Millard escrows at the request of the borrowers, and that the terms of the escrows were common to commercial real estate loans.

Banc, the manager of the properties, and Jesse N. Lipschuetz, one of Fiedler's attorneys and the escrow agent, were also parties to the escrow agreements. Under both escrows, Lipschuetz deposited all shopping center rents and revenues into accounts maintained by Banc, which in turn prepared checks for payment of expenses and debt service. Both escrows granted Balcor an expense-payment monitoring facility under which Balcor could review all proposed expenditures by Banc, prior to disbursements. Lipschuetz and Rice both testified that the escrows were created as a means of ensuring that rent-based revenue streams were not diverted to uses unrelated to Hoffman and Millard obligations. Rice also testified that Fiedler wanted the escrows in order to assure Balcor that all creditors of Hoffman and Millard would be paid.

The bankruptcy trial court record established that until immediately prior to the bankruptcy filings when Hoffman and Millard stopped making payments to any of their creditors, all trade creditors of Hoffman and Millard were paid during the two year and seven month term of the Hoffman escrow and the one year and five month term of the Millard escrow. The only payments Balcor refused to authorize during those time periods were two payments requested by Banc for services unrelated to the properties and national trade convention expenses, and one payment requested by Lipschuetz for legal fees unrelated to the properties.

III. THE OPINIONS BELOW

After the trial of the adversary proceeding, on April 30, 1992, the bankruptcy court issued its Order. The court made the following findings material to the issues raised in this Petition:

(1) The escrow payments at issue were made while Hoffman and Millard were insolvent;

(2) The escrow payments at issue were voidable preferential transfers for the benefit of insiders (the guarantors, not Balcor) within the meaning of 11 U.S.C. § 547(b)(4), and the preference period was extended from 90 days to one year under the insider-transfer rule;[2]

(3) Balcor did not usurp control over the debtors' businesses and finances, and thus Balcor was not an insider of the debtors;

(4) The loan payments under the escrows represented an "unusual debt collection" practice; and

(5) The loan payments were not made in the ordinary course of business; the payments did not qualify for that statutory exception to the preferential transfer avoidance rule, 11 U.S.C. § 547(c)(2). (App. 34-8, 40-2)

Balcor initially appealed the bankruptcy court decision to the United States District Court for the District of Colorado. The district court affirmed in all respects. 145 B.R. at

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[2] Whether Section 547(b)(4)(B), the insider preference rule, may apply at all to transfers to outsider creditors that benefit insider guarantors, is not a question raised in this Petition. While Balcor raised that issue in the courts below, Balcor recognizes that the rule favoring avoidance of such outsider transfers, though widely criticized in the scholarly literature, has been accepted by the circuits that have reached the issue.

686-8. (App. 23-4, 26-7) Subsequently, Balcor appealed the district court decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the decision that the ordinary course of business defense did not apply to the Balcor transfers. 12 F.3d at 1554. (App. 5-6)

Construing the statute's intent, the court stated that even commonly used business practices cannot constitute "ordinary business terms", unless those practices are of a type used in "ordinary situations":

> The Code does not define "ordinary business terms": The phrase could mean terms that creditors in similar situations commonly would use, even if the situation itself is extraordinary. *See Jones v. United Savings & Loan Ass'n. (In re U.S.A. Inns)*, No. 93-1631, 1993 WL 444162, at *5 (8th Cir. Nov. 4, 1993) (Subsection (c)(2)(C) "requires evidence of prevailing practice among similarly situated members of the industry facing the same or similar problems." *Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.)*, 121 B.R. 69, 75 (D. Kan. 1990) ("If an accepted or common practice of the industry, it is an 'ordinary business term.' "). Or it could mean terms that are used in usual or ordinary situations. *We think that the purposes of the preference section suggest the latter meaning.*

Id. at 1553. (App. 4) (Emphasis added.)

The court then held that "ordinary business terms" is defined as follows:

> Ordinary business terms are therefore those used in "normal financing relations": *the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy.*

Id. (App. 5) (Emphasis added.)

In the application of that holding to the escrows in question, the Tenth Circuit found that the escrows were not ordinary business terms. The court stated:

> The escrow arrangement with Balcor was not a normal financing relationship. The record shows that creditors in the industry only use such an arrangement in extraordinary circumstances, when debtors are in trouble.

Id. at 1554 (App. 5)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CREATES A SHARP SPLIT IN CIRCUIT AUTHORITY AS TO THE MEANING AND APPLICATION OF 11 U.S.C. § 547(c)(2)(C), THE ORDINARY BUSINESS TERMS ELEMENT OF THE ORDINARY COURSE OF BUSINESS DEFENSE.

In its unprecedented interpretation of the "ordinary business terms" element, the Tenth Circuit has altered the realties of the business world so that the only "ordinary" businesses are "healthy" businesses. In such an idealistic marketplace, a statutory exception designed to help save troubled businesses from bankruptcy could be invoked only if those businesses could operate as if they were trouble-free.

The Tenth Circuit's ultra-narrow construction of the "ordinary business terms" element of the "ordinary course of business" exception directly conflicts with authorities on point from the Seventh, Eighth and Fourth Circuits that recognize § 547(c)(2)(C) as a broadly inclusive method to measure ordinariness within a lending industry that routinely deals with businesses in trouble. *In re Tolona Pizza Products Corp.*, 3 F.3d 1029 (7th Cir. 1993); *Jones v. United Sav. and Loan Assn. (In re U.S.A. Inns of Eureka*

Springs, Arkansas, Inc.), 9 F.3d 680 (8th Cir. 1993); *Harman v. First American Bank of Maryland (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479 (4th Cir. 1992).

The "healthy business" restriction invented below also contradicts this Court's teaching that the very purpose of the Section 547(c) defenses to preference avoidance, including the ordinary-course defense, is to encourage dealings with "troubled debtors." *See Barnhill v. Johnson*, ___ U.S. ___, 112 S.Ct. 1386, 1391 (1992), *aff'g In re Antweil*, 931 F.2d 689 (10th Cir. 1989).

Indeed, the Tenth Circuit opinion departed from all pre-existing case law in holding that, when Congress wrote "ordinary business terms", what Congress really meant was "the kind of terms that creditors and debtors use in ordinary circumstances, *when debtors are healthy*." 12 F.3d at 1553 (App. 5) (Emphasis added.) It comes as no surprise that for such a key proposition of law, the opinion below identifies no supporting authority whatsoever.

No other circuit had previously imposed a "healthy business" restriction on the "ordinary business terms" requirement. Recently, the Third Circuit paradoxically endorsed the Tenth Circuit's "healthy business" standard, even as it adopted and expanded the Seventh Circuit's broadly inclusive standard of ordinariness within an industry. *Fiber Lite Corp. v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, ___ F.3d ___, 1994 WL 72656 (3rd Cir. March 11, 1994). That paradox is fully discussed below.

Each other circuit that has held that § 547(c)(2)(C) creates an objective standard, as the Tenth Circuit did here, has construed "ordinary business terms" to encompass industry practices characteristic of businesses in questionable financial health. The majority rule, in fact, focuses on whether a given business practice has attained some threshold level of recognition—as distinct from dominance—

within an industry, either irrespective of the fiscal fitness of businesses engaged in that practice or with an emphasis on the practices of businesses with similar financial problems.

The Seventh Circuit, in *Tolona*, has construed the "ordinary business terms" provision to embrace the broad range of practices in which firms generally *similar to the creditor* engage. *Tolona*, 3 F.3d at 1033 (7th Cir. 1993). Not only is the "health" of the debtor immaterial to the *Tolona* analysis, the reference point for the test is the creditor, not the debtor. *Tolona* holds that only business practices "so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection (C)." *Id.* It follows, necessarily, from the *Tolona* rule that "ordinary business terms" include practices employed by businesses similar to creditors who regularly must deal with debtors in some financial difficulty.

The Seventh Circuit's expansive reading of subsection 547(c)(2)(C) is grounded in two basic convictions: 1) that the "ordinary business terms" requirement, though mandating application of an objective, industry-based standard, is a lesser element of the ordinary-course-of-business defense than the section's cornerstone, subsection (c)(2)(B), which provides that a transfer must arise in the ordinary course of business between the debtor and creditor, *Id.* at 1032;[3]

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[3] On that point, *Tolona* states:

> From this standpoint, however, the most important thing is not that the dealings between the debtor and the allegedly favored creditor conform to some industry norm but that they conform to the norm established by the debtor and the creditor in the period before, preferably well before, the preference period.

3 F.3d at 1032.

and 2) that the law should not push businesses to agree on a single set of billing practices, as "the relevant business and financial considerations vary widely among firms . . .", *Id.* at 1033.

The Tenth Circuit opinion, however, inverts that priority. The Tenth Circuit concluded, at the threshold, that it need not address the first two elements of ordinary course of business exception, subsection 547(c)(2)(A) and (B), because the escrow payments failed to satisfy the third element, subsection (c)(2)(C), the "ordinary business terms" requirement. 12 F.3d at 1553. Thus, for want of evidence of business practices associated exclusively with "healthy" businesses, the Tenth Circuit rejected the ordinary-course defense without even beginning the critical analysis of prior dealings between the debtor and creditor pursuant to subsection (c)(2)(B). Had that analysis been performed, presumably the court would have been compelled to address the crucial, undisputed trial evidence that: 1) the Hoffman escrow was operational fully one year and seven months before the start of the one-year insider preference period, and the Millard escrow was operational fully five months before the preference period commenced; and 2) both escrows operated on the same basis before and during the one-year preference period. Besides the Seventh Circuit in *Tolona*, several other circuits have found that the primary focus of defense is the prior dealings between the parties. *See, e.g., Jeffrey Bigelow*, 956 F.2d at 486-8; *Waldschmidt v. Ranier (In re Fulghum Constr. Corp.)*, 872 F.2d 739, 743 (6th Cir. 1989); *WJM, Inc. v. Massachusetts Dept. of Public Welfare*, 840 F.2d 996, 1011 (1st Cir. 1988).

In even sharper contrast to the opinion below, the Eighth Circuit has held that "ordinary business terms" comprise business terms associated with businesses facing problems, as distinct from healthy businesses. *U.S.A. Inns*, 9 F.3d at 685. *U.S.A. Inns*, acknowledging the legislative

history of § 547(c)(2) and prior judicial construction, concluded that:

> [T]he focus of subsection (c)(2)(C) should be on whether the terms between the parties were *particularly unusual* in the relevant industry, and that evidence of a prevailing practice among *similarly situated members of the industry facing the same or similar problems* is sufficient to satisfy section (c)(2)(C)'s burden.

Id.[4] (Emphasis added.)

At issue in *U.S.A. Inns* was whether the ordinary course defense applied to otherwise avoidable preferential transfers consisting of real estate loan repayments that were delinquent, irregular and less than the agreed dollar amount. *Id.* at 682. An officer of the creditor (a savings and loan) testified that "probably eight to ten percent" of the creditor's accounts were on pay schedules similar to the debtor's—certainly not a prevalent practice. *Id.* at 685. That officer, however, also testified that it was a "regular practice in the savings and loan industry to work with *delinquent customers* as long as some type of payment is forthcoming. . ." *Id.* (Emphasis added.)

The bankruptcy court in *U.S.A. Inns* had found that the creditor had not met its evidentiary burden, under § 547(c)(2)(C), in that the creditor "presented no evidence that the late note payments were so common within the savings and loan industry that it could be considered an ordinary business practice. . ." *Id.* at 682. The district court reversed, and the Eighth Circuit affirmed, expressly relying on the testimony of the savings and loan officer that it was a regular industry practice to work with delinquent custom-

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[4] *U.S.A. Inns* also expressly adopts the *Tolona* rule, *supra.*, that all non-idiosyncratic practices within the broad range of industry practices are "ordinary" under subsection (c)(2)(C). 9 F.3d at 685.

ers. *Id.* at 682, 685-6. Applying its "not particularly unusual" standard, the Eighth Circuit found that the late, irregular payments were indeed made according to "ordinary business terms." *Id.* at 685-6.

It is impossible to reconcile the Eighth Circuit's ruling that late, irregular, deficient payments from a troubled debtor are not "particularly unusual", with the ruling below that payments under escrow agreements in place several months before the start of the transfer avoidance period are unusual. Here, as in *U.S.A. Inns*, Balcor dealt with Hoffman and Millard at arm's length, agreeing to an escrow mechanism that was a recognized industry practice, according to the testimony of one of the debtors' partners and property manager, Gregory Rice.[5]

In its recent decision, the Third Circuit also expressly adopted the Seventh Circuit's interpretation, in *Tolona*, of what "ordinary business terms" means. *Molded Acoustical*,

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[5] Significantly, the Tenth Circuit opinion neither rejects nor acknowledges the finding of the bankruptcy court, or the affirmance of that finding by the district court, that Balcor exerted no insider control over the debtors through its role in monitoring the escrow payments, and thus was not an insider. Relying solely on the Trustee's rendition of the facts, the Tenth Circuit found that Balcor used the escrows to favor itself over other creditors by denying or delaying payments to others in order to assure payments on its mortgages with Hoffman and Millard. 12 F.3d at 1554. (App. 6). The Tenth Circuit did not even address trial testimony from Lipschuetz, the escrow agent, that Balcor and all of the trade creditors were paid under the escrows. The court also did not acknowledge unrefuted trial evidence that the only creditor bills that went unpaid as a result of Balcor's expense-monitoring role were either improper Banc or Lipschuetz expense claims unrelated to the Hoffman or Millard operations.

1994 WL 72656 at *6.[6] Indeed, the Third Circuit embellished the rule of *Tolona*, by giving great weight to the length and nature of the relationship between the creditor and debtor in its interpretation of § 547(c)(2)(C):

> In sum, we read subsection C as establishing a requirement that a creditor prove that the debtor made its pre-petition preferential transfers in harmony with the range of terms prevailing as some relevant industry's norms. That is, subsection C allows the creditor considerable latitude in defining what the relevant industry is, and even departures from that relevant industry's norms which are not so flagrant as to be "unusual" remain within subsection C's protection. In addition, when the parties have an enduring, steady relationship, one whose terms have not significantly changed during the pre-petition insolvency period, the creditor will be able to depart substantially from the range of terms established under the objective industry standard inquiry and still find a haven under subsection C.

Id. at *9. That reasoning clearly favors a finding of ordinariness here, where the escrows were operational and unchanged from well prior to the start of the one-year preference period until the bankruptcy filings.

At the same time, *Molded Acoustical* also cited the opinion below in stating, "We think ordinary business terms

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[6] The Third Circuit deviated from *Tolona* only by substituting the word "unusual" for "idiosyncratic" as follows:

> . . . [O]nly dealings so unusual as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.

Id.

are those which prevail in healthy, not moribund, creditor-debtor relationships." *Id.* at *9, *citing In re Meridith Hoffman*, 12 F.3d at 1553. In the very next sentence of the opinion, however, the Third Circuit acknowledged the contrary holding of *U.S.A. Inns* that "evidence of a regular practice in the savings and loan industry of working with delinquent customers on special terms [is] sufficient to satisfy subsection C." *Id.*, *citing U.S.A. Inns*, 9 F.3d at 685.

Thus, *Molded Acoustical* underscores the doctrinal confusion created by the Tenth Circuit's "healthy business" requirement while, at the same time, expanding the rule of *Tolona* that § 547(c)(2)(C) covers the entire, broad range of business practices achieving some threshold of recognition within an industry. On balance, *Molded Acoustical* simply reinforces the fundamental split in circuit authority on the question presented and the Tenth Circuit's departure from this Court's teaching in *Barnhill*, and further establishes the need for resolution of that division and confusion.

The Tenth Circuit decision also conflicts with the Fourth Circuit's holding that debtor workout arrangements commonly used *only* by troubled debtors meet the statute's ordinariness requirement. *Jeffrey Bigelow*, 956 F.2d at 488. There the court assessed the challenged transfers, under an unconventional, three-way loan refinancing arrangement, from the perspective of other creditors, and concluded:

> Most significantly and following the purpose of the exception, these transfers must be seen as normal and usual by other creditors. An entity *encountering difficult financial times often seeks loans from reputable institutions as part of its workout efforts.*

Id. (Emphasis added.)

It should be noted that the quoted language appears in the Fourth Circuit's analysis of § 547(c)(2)(A), the first ele-

ment of the ordinary-course test requiring that the transfer at issue be in payment of a debt incurred in the ordinary course of business of the debtor and transferee (the focus of § 547(c)(2)(A) being on the ordinariness of the debt, as between the parties, rather than the ordinariness of the transfer mechanisms). Nevertheless, the quoted language clearly refers to the transfers at issue, not just the underlying debt, and supports the court's conclusion that § 547(c)(2)(C) was satisfied as well.

The Tenth Circuit focused only on the simple fact of existence of the escrows and ignored their durations and effects. On the other hand, the Fourth Circuit was able to analyze the unconventional credit arrangement under which the challenged transfers were made and distinguish between what may have not been commonplace, but nevertheless was ordinary. In specific reference to subsection (c)(2)(C), the Fourth Circuit stated:

> Admittedly, the business terms setting up these transfers may not be commonplace; however, the Code requires only ordinariness.

Id. Accordingly, the court in *Jeffrey Bigelow* held that the ordinary-course test was satisfied:

> We fail to see how these transfers could have been more ordinary. The existence of two years of regular payments on the debt indicate that the last transfers, made in the same manner, are simply following the ordinary course of business pattern between the two parties.

Id.

Since the Hoffman and Millard escrows were operational one year and seven months, and five months, prior to the *start* of the one-year insider preference periods, respectively, the same reasoning should have been used by the Tenth

Circuit in order to apply the ordinary course defense uniformly. Instead, the important comparison of the parties' relations before and during the preference periods which was so strongly emphasized in *Jeffrey Bigelow*, *Tolona* and *Molded Acoustical* was ignored by the Tenth Circuit.

In sum, *Tolona*, *U.S.A. Inns*, and *Jeffrey Bigelow* all stand for an inclusive construction of the "ordinary business terms" provision, one in which "ordinariness" extends to the full panoply of business practices common to businesses facing common problems, so long as those practices are not particularly unusual or idiosyncratic. Those consistent, practical views simply cannot be reconciled with the rule of the Tenth Circuit, apparently adopted by the Third Circuit, construing "ordinary business terms" to exclude all business terms not used in "ordinary circumstances", i.e., "when debtors are healthy."

II.

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S TEACHING, IN *BARNHILL v. JOHNSON*, THAT THE PURPOSE OF SECTION 547(c)(2) IS TO ENCOURAGE CREDITORS TO "DEAL WITH TROUBLED DEBTORS".

Ultimately, the Tenth Circuit decision simply does not square with this Court's teaching that the congressional purpose underlying the ordinary-course exception is ". . . to encourage creditors *to deal with troubled debtors* on normal business terms by obviating any worry that a subsequent bankruptcy filing might require a creditor to disgorge as a preference an earlier received payment." *Barnhill v. Johnson*, ___ U.S. ___, 112 S.Ct. 1386, 1391 (1992), *aff'g In re Antweil*, 931 F.2d 689 (10th Cir. 1989). (Emphasis added.) It is diametrically opposed to that construction to conclude, as the Tenth Circuit did, that only terms "normal" from the perspective of healthy, non-troubled debtors can satisfy the ordinary-business-terms requirement.

Implicit in this Court's interpretation of § 547(c)(2) in the *Barnhill* formulation is the assumption that a creditor knows a "troubled debtor"—to use this Court's phrase—when it sees one. If the law only protected a creditor doing business with a recognizably troubled debtor on business terms "normally" associated only with a secure, "healthy" debtor, as the Tenth and Third Circuits have held, the creditor's incentive to deal will cease to exist and bankruptcy filings will multiply.

CONCLUSION

When each of the circuit decisions discussed above is analyzed, only the "healthy business" rule is fundamentally incompatible with this Court's teaching in *Barnhill* that the ordinary-course defense was intended to encourage creditors to deal with troubled debtors. Thus, besides creating a recognizable split in circuit authority, the Tenth Circuit opinion injected significant confusion into the ordinary-course-of-business analysis. It certainly is more problematic to identify business terms associated exclusively with "healthy" businesses, as the opinion requires, than it is to simply identify business terms that have attained some semblance of recognition within a given industry. Indeed, the near-metaphysical threshold question implicitly raised by the decision below—what is a "healthy" business—at best invites doctrinal confusion, and at worst guarantees chaos in relationships between lenders and borrowers. For lenders and trade creditors debating whether to continue to finance or throw down the gauntlet to businesses experiencing financial downturns, and for those borrowers in need, the stakes raised by the Tenth Circuit decision hardly can be overstated. By magnifying the perceived business risk attendant to working with and extending credit to troubled debtors, the Tenth Circuit decision undermined the

very policy purpose of the ordinary course of business defense, as defined by this Court in *Barnhill*.

We respectfully urge this Court to take the case, resolve the split in circuit authority and clarify the application of a statute enacted to promote, rather than destroy, relationships between lenders and financially troubled debtors.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-1337

In re MERIDITH HOFFMAN PARTNERS, a Colorado general partnership; Meridith Millard Partners, a Nebraska general partnership, Debtors.

H. Christopher CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,

Plaintiff-Appellee,

v.

BALCOR REAL ESTATE FINANCE, INC., an Illinois corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado.
No. 92-K-1003 - **John H. Kane, Jr.**, *Judge*

December 28, 1993
Rehearing Denied January 20, 1994

Before McKAY, ANDERSON, and EBEL, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

Balcor Real Estate Finance, Inc. appeals on two grounds from the district court's decision affirming the bankruptcy

court's ruling that the trustee in bankruptcy could recover from Balcor preferential payments it received during the year preceding the bankruptcy petition. 145 B.R. 682. First, Balcor argues that the payments it received from the debtors, Meridith Hoffman Partners and Meridith Millard Partners, were not avoidable because they were made in the ordinary course of business. See 11 U.S.C. § 547(c)(2). Second, Balcor argues that the extended one-year preference period should not apply to the payments it received from the debtors. See id. § 547(b)(4)(B). We conclude that the debtors did not make the payments to Balcor "according to ordinary business terms" as required by section 547(c)(2)(C), and that the one-year preference period does apply. We therefore affirm the district court on both issues.

BACKGROUND

Meridith Hoffman Partners and Meridith Millard Partners were general partnerships that each owned and operated a single shopping center. Lawrence Fiedler was the controlling and managing general partner of both partnerships.

After buying their shopping centers at the end of 1984, both partnerships borrowed money from Balcor, a mortgage lender for commercial real estate developments. Meridith Hoffman borrowed $3,550,000 and Meridith Millard borrowed $5,300,000. Fiedler and the Meridith Organization, Inc. guaranteed both loans. Appellee's Supp.App. Tab 1. Although the loans were secured by deeds of trust and assignments of rents, Balcor was an undersecured creditor in bankruptcy because it did not perfect its assignments of rents before the bankruptcy petitions were filed.

The partnerships each signed escrow agreements with Balcor over a year after signing the original promissory notes. The bankruptcy court found that both partnerships

were in default when they entered the escrow agreements. *Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners)*, No. 91-1338-SBB, slip op. at 2-3 (Bankr.D.Colo. Apr. 30, 1992). Under the escrow agreements, the escrow agent deposited all rents from the shopping centers into an escrow account. The property manager could make disbursements from this account only after Balcor approved them.

Fiedler and others filed an involuntary Chapter 11 petition against the partnerships, which was later converted to a Chapter 7 liquidation, thirty-one months after the Meridith Hoffman escrow agreement was signed and seventeen months after the Meridith Millard escrow agreement was signed. The trustee sought to avoid as preferences for the benefit of an insider all payments to Balcor during the year preceding the bankruptcy petitions. During the preceding year, Meridith Hoffman had paid Balcor $140,128.94 and Meridith Millard had paid Balcor $255,722.44. The bankruptcy court held that the payments to Balcor were preferences for the benefit of an insider, and did not qualify for the ordinary course exception in section *1553 547(c)(2). The district court affirmed then Balcor appealed.

DISCUSSION

I. *Ordinary Course of Business Exception*

Balcor admits that the disputed transfers are preferences under section 547(b), but argues that they are not avoidable because they meet the ordinary course of business exception in section 547(c)(2). Balcor has the burden of proving that the payments qualify for the exception. See 11 U.S.C. § 547(g). The bankruptcy court concluded that the debtors did not make the payments in the ordinary course of business. Because this conclusion is primarily factual, we must accept it unless it is clearly incorrect. *Fidelity Sav. & Inv. Co. v.*

New Hope Baptist, 880 F.2d 1172, 1177 (10th Cir.1989) (per curiam).

The trustee may not avoid a preferential transfer if the underlying debt was incurred in the ordinary course of the parties' business, the payments were made in the ordinary course of the parties' business, and the payments were "made according to ordinary business terms." 11 U.S.C. § 547(c)(2). Because we conclude that the payments were not made according to ordinary business terms, we do not discuss whether they meet the other two requirements.

The Code does not define "ordinary business terms." The phrase could mean terms that creditors in similar situations commonly would use, even if the situation itself is extraordinary. *See Jones v. United Sav. & Loan Ass'n (In re U.S.A. Inns)*, 9 F.3d 680, 685 (8th Cir.1993) ("Subsection (c)(2)(C) . . . requires evidence of a prevailing practice among similarly situated members of the industry facing the same or similar problems."); *Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.)*, 121 B.R. 69, 75 (D.Kan.1990) ("If an accepted or common practice of the industry, it is an 'ordinary business term.' "). Or it could mean terms that are used in usual or ordinary situations. We think that the purposes of the preference section suggest the latter meaning.

The purpose of the ordinary course exception is "to leave undisturbed normal financing relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." S.Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), 1978 U.S.C.C.A.N. 5787, 5874. The preference section does not discourage "unusual action" simply because others in the industry wouldn't respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain cred-

itors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out. See *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir.1993); *Harman v. First Am. Bank (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 488 (4th Cir.1992) (holding that payments were in ordinary course because, although not common, they did not favor certain creditors or encourage a race to dismember the creditor); *Courtney v. Octopi, Inc. (In re Colonial Discount Corp.)*, 807 F.2d 594, 600 (7th Cir.1986) ("The obvious extra 'ordinary' transaction is one designed to give the transferee an advantage over other creditors in bankruptcy."), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1954, 95 L.Ed.2d 526 (1987). Ordinary business terms therefore are those used in "normal financing relations": the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy. Such terms do not raise the dangers that the preference section seeks to avoid. Even arrangements that creditors commonly try to use when a debtor is struggling may give a creditor an advantage over others and precipitate bankruptcy. For example, filing a lawsuit to enforce a debt may not be unusual when a debtor does not pay, but payments according to a settlement agreement are not according to ordinary business terms. *Cf. Gull Air, Inc. v. Beech Acceptance Corp. (In re Gull Air, Inc.)*, 82 B.R. 1, 3-4 (Bankr.D.Mass.1988) (holding that payments according to a settlement agreement were not in the ordinary course of business because a lawsuit is an unusual collection method).

The escrow arrangement with Balcor was not a normal financing relationship. The record shows that creditors in the industry use such an arrangement only in extraordinary circumstances, when debtors are in trouble. Appellee's Supp.App. Tab 3, at 127, 129-32, 141-42. The record also suggests that Balcor entered the escrow agreement with the

debtors because the debtors were delinquent and Balcor was worried about getting paid. Id. at 70.[1] Furthermore, the escrow agreement enabled Balcor to favor itself. Balcor occasionally used this power to make sure that money was available for itself by denying other payments. The record supports the finding that Balcor used its authority to delay payments to other creditors and to pay its mortgage first. Id. Tab 6, at ¶ 6, Tabs 8-9.[2] Balcor also conditioned payments to trade creditors upon receipt of payments to itself and denied payment of certain expenses. See id. Tabs 10-13. The payments therefore were made according to terms that were not used in normal or ordinary situations and that made it possible for Balcor to favor itself, thus increasing the risk of bankruptcy as well. The payments to Balcor were not made according to ordinary business terms and do not qualify for the exception in section 547(c)(2).

II. *One-Year Preference Period*

The bankruptcy court held that the trustee could avoid the debtors' payments to Balcor made during the year preceding the bankruptcy filing. The court followed our prece-

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[1] The trustee claims that Balcor earlier admitted that the loans were in default when the escrow agreements were formed and now is estopped from arguing otherwise. Because the record sufficiently indicates at least that the escrow agreement was formed because of Balcor's concerns and the debtors' delinquency, and because s 547(c)(2)(C) is objective anyway, we do not address the trustee's judicial estoppel argument.

[2] Balcor argued for the first time in its reply brief that the documents at Tabs 8 and 9 were not admitted in evidence. After oral argument the trustee moved to supplement the record with pages 27 through 43 of the trial transcript to show that the documents were admitted. Although we could have reviewed the trial transcript in any event, we grant their motion to supplement the record and agree that the documents were admitted in evidence.

dent in reasoning that the extended one-year preference period applied because the payments were "for the benefit of" two "insiders," Fiedler and the Meridith Organization, who had guaranteed the debt to Balcor and who thereby received more on their contingent claims than they otherwise would have received. See 11 U.S.C. § 547(b); *Manufacturers Hanover Leasing Corp. v. Lowrey (In re Robinson Bros. Drilling, Inc.)*, 892 F.2d 850 (10th Cir. 1989) (per curiam) (adopting opinion in *Lowrey v. First Nat'l Bank (In re Robinson Bros. Drilling, Inc.)*, 97 B.R. 77 (W.D.Okla.1988)). Balcor argues that Robinson Bros. does not justify the extended preference period in this case and that if it does we should overrule it. We must accept the bankruptcy court's factual findings unless clearly erroneous, but we do not defer to its legal conclusions. *Fidelity Sav.*, 880 F.2d at 1174. We conclude that Robinson Bros. correctly interprets the Bankruptcy Code and does permit extended recovery in this case.

A. *Equal Treatment of the Outsider Creditor*

We disagree with Balcor's argument that the trustee should not be able to recover any payments made before the regular ninety-day preference period because the debtors did not treat Balcor better than other creditors. Although Congress intended the extended preference period to prevent unequal distribution motivated by benefit to insiders, the statute does not require any proof that the debtor actually did favor the insider, or the initial transferee in cases like this. The statute only requires proof that the insider received more on his claim than he would have received otherwise. 11 U.S.C. § 547(b)(5). Even if the debtor had no intention of favoring the insider, payments to an unsecured insider that are not in the ordinary course of business will be avoided up to one year before bankruptcy while similar

payments to other creditors will be avoided only up to ninety days. See *T.B. Westex Foods, Inc. v. FDIC (In re T.B. Westex Foods, Inc.)*, 950 F.2d 1187, 1195 (5th Cir.1992) (explaining that equality of distribution *1555 is equally important even if preferences were involuntary and debtor obviously was not intentionally preferring the creditor). It does not matter whether the debtors actually favored Balcor; all that matters in deciding whether to apply the extended preference period is whether the transfers that benefited the insider guarantors enabled them to receive more on their contingent claims than they would have received in bankruptcy without the transfers.

If the debtor truly does not treat the creditor any better than other creditors, the transfers usually will be in the ordinary course of business and thus will not be avoidable at all. Some courts have refused to allow extended recovery in insider guarantor cases because they thought that doing so would make the ordinary course defense meaningless by letting the trustee avoid transfers regardless of any defenses the outsider creditor may have. See *Performance Communications, Inc. v. First Nat'l Bank (In re Performance Communications, Inc.)*, 126 B.R. 473, 476-77 (Bankr.W.D. Pa. 1991). Even if a transfer is avoidable under section 547(b) because of benefit to a creditor other than the initial transferee, the exceptions apply to the transfers, not to the creditors. If a transfer was "in payment of a debt incurred . . . in the ordinary course of business," for example, it is not avoidable and cannot be recovered under section 550(a) from anyone, whether initial transferee or the creditor for whose benefit the transfer was made. However, as we have already explained, Balcor did receive special treatment in the manner of payment and thus has not proved that the disputed transfers were in the ordinary course of business.

B. *"For the Benefit of" Insider Guarantors*

The preference section will extend the preference period to one year only "if such creditor at the time of such transfer was an insider." 11 U.S.C. § 547(b)(4)(B). "Such creditor" refers to the only previous mention of creditor in section 547(b), which says that a preference must be "to or for the benefit of a creditor." Id. § 547(b)(1). Therefore the one-year preference period may apply only if the transfers were made "for the benefit of" an insider creditor.

Balcor does not dispute that Fiedler and the Meridith Organization were insiders and creditors, but argues that the payments were not for their benefit because they did not benefit financially. Balcor claims that the bankruptcy court incorrectly held that the insiders benefited by the delay of foreclosure, because considering non-pecuniary benefits as a benefit under (b)(1) is inconsistent with the requirement that the creditor receive more on his claim under (b)(5). See *Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 800-01 (1st Cir.1992) (holding that delaying bankruptcy proceedings was not a "benefit" to an insider because benefit under (b)(1) means only "a quantifiable monetary reduction in the insider-creditor's contingent claim").

We need not decide whether a delay in foreclosure is a benefit under (b)(1), however, because the bankruptcy court also correctly found that the insiders did benefit financially from the payments to Balcor. The court observed that the insider guarantors benefited from a reduction in their exposure on the guaranties. Clark, No. 91-1338-SBB, slip op. at 5. Reducing potential liability on the guaranties financially benefited the guarantors. See *Lowrey v. Manufacturers Hanover Leasing Corp. (In re Robinson Bros. Drilling, Inc.)*, 6 F.3d 701, 703 (10th Cir.1993) (explaining that insider guarantor clearly benefits from reduction in his con-

tingent liability and thus reduction in his contingent claim against debtor); *Erin Food Servs.*, 980 F.2d at 797 ("There can be no question that an insider-guarantor derives measurable economic benefit from a payment on the guaranteed debt, to the extent the insider's contingent liability on the personal guaranty is reduced."); *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1190, 1194 (7th Cir.1989).

Balcor argues that the insiders did not benefit from a reduction in potential liability because they were insolvent and soon to enter bankruptcy themselves, so they would never have had to pay on their guaranties anyway. Whether a transfer is for the benefit *1556 of a creditor is determined at the time of the transfer, however. *Robinson Bros.*, 6 F.3d at 704. At the time of the transfer, the insiders were still liable on their guaranties. A reduction in that potential liability is a benefit even if the guarantor is hopelessly insolvent. Id. at 703; *Official Unsecured Creditors Comm. of Suffola, Inc. v. U.S. Nat'l Bank (In re Suffola, Inc.)*, 2 F.3d 977, 986 (9th Cir.1993) ("Insolvency is transitory, or at least not inherently permanent. A decrease in the degree of insolvency, like an increase in the degree of solvency, is beneficial.").

C. *"Such Creditor" Received More Than in Bankruptcy*

As we already have explained, subsection (b)(5) requires that the insider creditor received more of his contingent claim than he would have received in bankruptcy. See *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1493 (6th Cir.1990) (noting that (b)(1), (4), and (5) all refer to the same creditor, so the one-year period applies only if the insider guarantor received more than he would have otherwise). Regardless of whether non-pecuniary benefits satisfy (b)(1), the trustee must always prove that the insider guarantor benefited financially as described in (b)(5).

Although the bankruptcy court mistakenly considered whether Balcor received more than it would have received in bankruptcy, the record clearly shows that the insider guarantors also received more on their contingent claims against the debtors than they would have received in bankruptcy. The payments to Balcor simultaneously reduced the insiders' contingent claims against the debtors. Because the insider guarantors were unsecured, they would have received only a fraction of those amounts in bankruptcy. See *Elliott v. Frontier Properties (In re Lewis W. Shurtleff, Inc.)*, 778 F.2d 1416, 1421 (9th Cir.1985); Appellee's Supp. App. Tab 16.

Again, Balcor insists that the insider guarantors did not receive anything from the transfers because the insiders were insolvent and would not have had to pay on their guaranties in any event. However, (b)(5) does not say that the creditor ultimately must have benefited from receiving more on his claim. Actual benefit is irrelevant because the preference section is not strictly punitive. One of its primary purposes is to assure equality of distribution according to the statutory scheme. If the debtor favored a certain creditor because it reduced an insider's exposure, it would not matter whether the insider guarantor ultimately did not have to pay on the guaranty. The debtor still spent money that would have been part of the estate and available for fair distribution to all creditors. The result might be different if the insider was discharged in bankruptcy before the debtor's bankruptcy filing, because then the insider would not have a claim at all in the debtor's bankruptcy, but that is not the case here. See *Suffola*, 2 F.3d at 986.

We therefore conclude that the insider guarantors did receive more on their claim, regardless of their insolvency and eventual bankruptcy, and that Robinson Bros. supports extending the preference period in this case.

D. *Arguments to Overrule Robinson Bros.*

Balcor also offers several reasons that we should overrule Robinson Bros. if we conclude that it does apply in this case. However, a three-judge panel cannot overrule an earlier decision by the circuit. See, e.g., *United States v. Rockwell,* 984 F.2d 1112, 1117 (10th Cir.), *cert. denied,* __ U.S. __, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993). Even if we could, Balcor's arguments do not justify overruling Robinson Bros. First, Balcor complains that permitting extended recovery in insider guarantor cases raises the cost of commercial capital because lenders can't rely as much on insider guaranties. See *Weiskopf v. New York Job Dev. Auth. (In re J.T.L. Supermarket Corp.),* 145 B.R. 3, 4 (Bankr. N.D.N.Y.1992). Balcor also argues that it unfairly penalizes prudent lenders who get borrower guaranties. See *Official Creditors' Comm. of Arundel Hous. Components, Inc. (In re Arundel Hous. Components, Inc.),* 126 B.R. 216, 219 (Bankr.D.Md.1991). Such considerations may motivate *1557 Congress to amend the statute, but they do not permit courts to disregard the clear language of a statute. See *Union Bank v. Wolas,* __ U.S. __, __, 112 S.Ct. 527, 531, 116 L.Ed.2d 514 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."); *C-L Cartage,* 899 F.2d at 1494.

Second, Balcor argues that recently proposed congressional amendments that would eliminate this practice suggest that courts have misunderstood the statute. See S. 540, 103d Cong., 1st Sess. (1993); 138 Cong.Rec. S8357, S8359 (daily ed. June 17, 1992). Of course, the proposed amendments instead may mean that Congress has recognized the consequences of the present rule and decided that they should change it. The statute permits recovery from the initial transferee even though the transfer was avoidable

only because it benefited the insider. The statute means what it says even if Congress has thought better of it.

Next, Balcor complains that it is "grossly unfair" to take money from the initial transferee only because it benefited an insider guarantor, especially in this case where the initial transferee was protecting other creditors through an escrow arrangement. Appellant's Br. at 27, 29. However, the courts' equitable powers do not permit them to disregard the clear language of the statute, regardless of how unfair it may seem to be. See, e.g., *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 968, 99 L.Ed.2d 169 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."). Section 550(a)(1) clearly permits recovery from the initial transferee if the transfer is avoidable under section 547(b). *Robinson Bros.*, 97 B.R. at 80; *Levit*, 874 F.2d at 1194. Furthermore, we disagree that it is unfair. Regardless of the outsider creditor's culpability, fairness to the other creditors requires the creditor to return to the estate any payments it might not have received had they not benefited an insider. See *Suffola*, 2 F.3d at 980-81; *Levit*, 874 F.2d at 1198; cf. H.R.Rep. No. 595, 95th Cong., 1st Sess. 178 (1977), 1978 U.S.C.C.A.N. 5787, 5963, 6139 ("[A] creditor's state of mind has nothing whatsoever to do with the policy of equality of distribution, and whether or not he knows of the debtor's insolvency does little to comfort creditors similarly situated who will receive that much less from the debtor's estate as a result of the prebankruptcy transfer to the preferred creditor."). In some cases, unlike this one,[3] there may be no evi-

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[3] The bankruptcy court found that the insider guarantors were very concerned about releasing their guaranties, suggesting that they had reason to favor Balcor to forestall foreclosure and reduce their exposure. Clark, No. 91-1338-SBB, slip op. at 5.

dence at all that the debtor's preference of an outsider creditor was motivated by the benefit to an insider guarantor. But Congress chose to avoid transfers satisfying objective criteria that suggested a high risk of favoritism rather than requiring proof of subjective intent. Considering the likelihood of favoritism when the objective criteria are met and the difficulty of proving preferential intent, the objective approach does not seem unfair.

Finally, Balcor argues that there are actually two transfers involved—the payment to Balcor and the resulting reduction in exposure to the insiders—and only the latter is avoidable. See, e.g., *In re Aerco Metals, Inc.*, 60 B.R. 77, 79 (Bankr.N.D.Tex.1985). Every circuit that has considered the issue has rejected this theory and allowed extended recovery. See *Suffola*, 2 F.3d at 981-82; *C-L Cartage*, 899 F.2d at 1494-95; *Robinson Bros.*, 97 B.R. at 79-80; *Levit*, 874 F.2d at 1195-96. This "two-transfer" theory incorrectly defines transfer as a benefit received instead of property disposed. See 11 U.S.C. § 101(54) (defining "transfer" as "disposing of or parting with property" by any means); *C-L Cartage*, 899 F.2d at 1495. The two-transfer theory also mistakenly assumes that benefits to creditors, rather than transfers, are avoidable. See *Levit*, 874 F.2d at 1195-96. The theory therefore implies that the only reason for the preference section is to punish culpable creditors, rather than to recover money that may have been unfairly paid out by the debtor. Both the text of the *1558 statute and its underlying purposes favor extending recovery from the initial transferee if the transfers preferred an insider guarantor. We therefore AFFIRM the district court's ruling that the trustee may recover the transfers to Balcor made during the year preceding the filing of bankruptcy.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: MERIDITH HOFFMAN PARTNERS, a Colorado general partnership; MERIDITH MILLARD PARTNERS, a Nebraska general partnership,	)	
Debtors.	)	
H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,	)	
Plaintiff-Appellee,	)	
v.	)	No. 92-1337
BALCOR REAL ESTATE FINANCE, INC., an Illinois corporation,	)	
Defendant-Appellant.	)	

ORDER
Entered January 20, 1994

Before ANDERSON, MCKAY and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

ROBERT L. HOECKER, Clerk

Patrick Fisher
Chief Deputy Clerk

[Dated 9-30-92]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 92-1337	)	
	)	
In re:	)	
	)	
MERIDITH HOFFMAN PARTNERS, a Colorado general partnership, and MERIDITH MILLARD PARTNERS, a Nebraska general partnership,	)	
	)	
Debtors.	)	Civ. A. No. 92-K-1003
	)	
----------	)	Bankruptcy Nos. 89 B 06180 C 89 B 06181 C 89 B 06181 E
H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,	)	
	)	
Plaintiff/Appellee/Cross-Appellant,	)	
	)	September 30, 1992
v.	)	
	)	
BALCOR REAL ESTATE FINANCE, INC., an Illinois corporation,	)	
	)	
Defendant/Appellant/Cross-Appellee.	)	

MEMORANDUM DECISION ON APPEAL

KANE, Senior District Judge.

This case is before me on cross-appeals from a decision of the bankruptcy court. In its ruling below, the bankruptcy court concluded that the trustee could properly avoid certain preferential transfers (totalling nearly $400,000) the debtors, Meridith Hoffman Partners ("Hoffman") and Meridith Millard Partners ("Millard") (collectively "the partners"), made in the one-year period before they filed for bankruptcy protection and reorganization under chapter 11. The partners paid the sums to Balcor Real Estate Finance Inc., ("Balcor") an Illinois corporation which made loans totalling 8 million to the partners in 1985 and 1986.

Balcor argues in this appeal that the bankruptcy court wrongly concluded 1) that the partners were insolvent during the one-year preference period; 2) that the transfers benefitted certain insider-guarantors of the notes in question; 3) that it would have received less under a chapter 7 petition; and 4) that the transfers were the result of an unusual debt collection practice not made in the ordinary course of business. For the reasons discussed below, I affirm the bankruptcy court's judgment.

The trustee argues, in the cross-appeal, that the bankruptcy court wrongly concluded that Balcor was not a controlling insider under 11 U.S.C. § 547(b)(5). He asserts that the bankruptcy court should have found § 547(b)(5) an alternate basis under which to extend the preference period from 90 days to 1 year. I disagree, and accordingly affirm that portion of the bankruptcy court judgment as well.

I. *Facts and Procedural History*

Millard and Hoffman are, respectively, Nebraska and Colorado general partnerships organized in 1985 to develop shopping centers in the two states. Millard's partners included Meridith Plaza, Inc., Lawrence E. Fiedler and Greg

Rice. Hoffman's partners included Mer-Hof, Inc., Fiedler and Rice. In September, 1986, Millard executed two promissory notes totalling 5.3 million dollars in favor of Balcor secured by a first deed of trust and an assignment of rents which were later recorded in the appropriate county in Nebraska. Fiedler and the Meridith Organization guaranteed the promissory notes. Hoffman financed 3.5 million of the purchase price with a Balcor loan and note dated January 30, 1985, secured by a second deed of trust and an assignment of rents. Again, Fiedler and Meridith Organization both executed guaranties of the underlying note.

Hoffman executed an escrow agreement with Balcor and Jesse Lipschuetz, Esq., on October 3, 1986. Millard entered a similar escrow agreement on December 1, 1987. Both partners were delinquent and in default under the terms of the promissory notes when they entered into the escrow agreements. Under the terms of the escrow agreements, rents from the two properties were deposited to Lipschuetz's account. The respective property managers would regularly submit disbursement requests to Balcor and Lipschuetz which Balcor would review, comment on, reject or approve. The partners and the property manager retained primary control over day-to-day management and personnel decisions, while Balcor primarily exercised fiscal monitoring and supervising. Balcor approved nearly all submitted disbursement requests, except for a few involving the partners or insiders.

Involuntary petitions under chapter 11 were filed against the partners on May 8, 1989. The cases were converted to chapter 7 proceedings in August, 1990. The trustee filed a complaint to recover preferential transfers on April 26, 1991. In a joint pre-trial statement filed on February 21, 1992, the parties stipulated, among other things, that the partners were insolvent at the time of the transfers

and during all time periods relevant to the adversary proceeding. On March 13, 1992, after reviewing some of the trustees proposed exhibits (uncertified financial statements of the partners), Balcor notified the trustee that it would no longer be bound by its stipulation of insolvency. When it reviewed the exhibits, assertedly for the first time after February 21, 1992, it determined that the uncertified financial statements of the partners "did not establish the insolvency or solvency of either" of the partners. Appellant's opening Brief at 18. It claims that the financial statements were incomplete because they failed to take into account Hoffman and Millard's general partners' net worth. It offered, however, no evidence to suggest that the bankruptcy court would not have found the partners insolvent if it had considered those general partners net worth. The bankruptcy court held a hearing on the complaint on March 18, 1992. As a pre-trial matter, it refused to release Balcor from its joint pre-trial stipulation of insolvency. The bankruptcy court entered a written order on April 30, 1992 sustaining the complaint and ordering Balcor to return the funds it received in the year before the petitions were filed. These appeals followed.

II. *Discussion*

11 U.S.C. § 547(b)[1] broadly authorizes trustees to avoid

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[1] Except as provided in subsection (c), the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made—(A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an in-

(continued...)

transfers of a debtor's interest in property "if five conditions are satisfied and unless one of seven exceptions defined in subsection (c) is applicable."[2] *Union Bank v. Wolas,* 112 S.Ct. 527, 529, 116 L.Ed.2d 514 (1991). Balcor's appeal is only concerned with three of the five conditions and one of the exceptions. Balcor argues that no insiders received any benefit from the transfers [§ 547(b)(1) and (b)(4)(B)], that the partners were not insolvent at the time of the transfers [§ 547(b)(3)], and that it would not have received any lesser amount under a chapter 7 case [§ 547(b)(5)]. Finally, it argues that the transfers were made strictly in the ordinary course of business between itself and the partners [§ 547(c)(2)].

A. *Forbearance as Non-Pecuniary Benefit*

The bankruptcy court concluded that the preference period was properly extended pursuant to § 547(b)(4) to one year by virtue of a benefit to two insiders, Fiedler and Meridith Organization. Each had signed as guarantors on the notes. The bankruptcy court found, on the strength of *Levit v. Ingersoll Rand Financial Corp. (In re Deprizio)*, 874 F.2d 1186 (7th Cir.1989), and *Manufacturers Hanover Leasing*

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[1] (...continued)
sider; and (5) that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. 11 U.S.C. § 547(b).

[2] The trustee may not avoid under this section a transfer—(2) to the extent such transfer was—(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; and (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms. 11 U.S.C. § 547(c)(2).

Corp. v. Lowrey (In re Robinson Bros. Drilling Inc.), 892 F.2d 850 (10th Cir.1989), that the insider-guarantors had benefitted from the partners' payments to Balcor. It found benefit in Balcor's forbearance and willingness not to foreclose on the property or bring suit on the guarantees until after entry of the orders from relief for stay.

Balcor claims there was no factual support for the bankruptcy court's opinion because there was no evidence of forbearance. Since I review this claim on the clearly erroneous standard, I disagree. In the first place, it is not disputed that Balcor did not move to foreclose or otherwise protect its interests while the partners were making payments under the escrow agreements. This is true, despite the fact that the partners were insolvent and delinquent on their payments when they signed the escrow agreements. Furthermore, the bankruptcy court understood exhibits DDDD, EEEE, and FFFF to show that the guarantors were concerned about the release of their guaranties in the year immediately proceeding the bankruptcy filing. The bankruptcy court's finding of benefit to insider-guarantors by forbearance is thus not clearly erroneous.

Balcor also claims that *Robinson Bros.* and *Deprizio* do not apply where there is no pecuniary benefit to the insider-guarantors. In *Deprizio*, the seventh circuit held that the trustee could recover a transfer from an initial transferee where the transfer is a preference only as to an insider of the debtor and not as to the initial transferee. Only two other circuits have adopted a similar position. *Ray v. City Bank & Trust Co. (In re C-L Cartage Co., Inc.*, 899 F.2d 1490 (6th Cir.1990)); *Manufacturers Hanover Leasing v. Lowrey (In re Robinson Bros. Drilling, Inc.)*, 892 F.2d 850 (10th Cir.1989).

Most courts have held that a trustee may not recover from a non-insider creditor under these circumstances. *See,*

e.g., In re Performance Communications, Inc., 126 B.R. 473, 475 n. 3 (W.D.Penn.1991). Indeed, I find few boisterous boosters of the *Deprizio* approach. *See, In re Performance Communications*, 126 B.R. at 476 (describing the *Deprizio* analysis as analytically unmeaningful and fatally flawed in several respects); *In re Arundel Housing Components, Inc.*, 126 B.R. 216, 219 (Bankr.D.Md.1991) ("It represents an incorrect interpretation of the law whose application would subvert justice, produce much needless mischief and create an unfortunate result in this case."); and Godshall, Pettigrew, Musselman & Brooke, *Two Years Later: Eight Questions Left Unanswered (or Extremely Confused) by Deprizio*, 19 Cal.Bankr.J. 41, 61 (1991) (suggesting that the benefit is technical, not practical, only a matter of timing, not true benefit, and not the type of benefit envisioned by the Code.). As much as I agree that *Deprizio* and *Robinson Bros.* produce flawed results, I am nonetheless bound by the circuit's opinion. To the extent that Balcor urges that *Robinson Bros.* and *Deprizio* were wrongly decided and represent an incorrect interpretation of the bankruptcy code, it must address its arguments to a higher authority.

B. *Insolvency & § 547(b)(3)*

Balcor asserts that it should be relieved of its stipulation of insolvency because it entered into the stipulation before it was able to review the trustee's proposed evidence concerning insolvency. Balcor points me to the circuit's opinion in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 570 F.2d 899, 902 (10th Cir.1978), for the proposition that a court may relieve a party from an improvident agreement if the original agreement will cause manifest injustice. Noting that the law favors disposition of litigation on the merits, it claims the bankruptcy court abused its discretion when it forced the stipulation on Balcor. I review

the bankruptcy court's decision on an abuse of discretion standard.

The cases provide no bright line to determine when it is appropriate to release a party from an earlier Fed.R.Civ.P. 16 stipulation. I am variously instructed to prevent hardship to the parties, to prevent manifest injustice and avoid a return to "the old sporting theory of justice," and to allow amendments or modifications where there is little risk of surprise and prejudice to the opposing parties. See generally 6A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1527 at 284-86 (1990). The rule does not apply, however, where the evidence or issue was within the knowledge of the party seeking modification at the time of the stipulation. In such cases, the trial court should not allow the modification. *Burnett v. Dresser Industries, Inc.*, 849 F.2d 1277 (10th Cir.1988).

Here, I do not see how the bankruptcy court abused its discretion. Balcor has made no factual showing that it suffered prejudice by being held to its stipulation. During the hearing, it offered no evidence that the presence of the general partners' net worth would significantly alter the financial equation. Nor was it able to show that there would be little or no prejudice to the trustee if, five days before trial, he suddenly had to produce the documents and witnesses necessary to prove insolvency. Finally, I note that the trustee filed his adversary complaint more than a year before the case proceeded to trial. During that time, Balcor had ample opportunity to determine through the usual discovery processes the true solvency of the partners. Its failure to do so should not be laid at the trustee's doorstep.

C. Evidence of a Lesser Amount—§ 547(b)(5)

Balcor urges me to reverse the bankruptcy court's decision that the transfers allowed it to receive more than it would have received under chapter 7 pursuant to 11 U.S.C. § 547(b)(5). I decline to so rule.

The bankruptcy court found that Balcor was a nonrecourse creditor of both estates on the date the partners filed for protection. It found that although Balcor had recorded an assignment of rents, Balcor did not perfect its interests in the rents until the post-petition filing of its notices pursuant to 11 U.S.C. § 546(b). *See Consolidated Capital Income Trust v. Colter, Inc.*, 47 B.R. 1008 (D.Colo.1985). As a non-recourse creditor, Balcor would have been entitled to receive nothing in a chapter 7 proceeding. See 11 U.S.C. § 1111(b)(1)(A); *In re PCH Associates*, 949 F.2d 585, 604 (2d Cir.1991).

Balcor does not contest this finding, it simply ignores it. It argues, instead, that the bankruptcy court should have performed a distribution analysis to determine whether it obtained a greater return on its claim than it would have otherwise by surrendering the payments. Even assuming Balcor should be considered an unsecured creditor, I disagree. The trustee testified without contradiction that payments to the unsecured creditors would be less than 100%. In such a situation, the preferential payments to an unsecured creditor allow it to receive more than it would in a chapter 7 proceeding. *Palmer Clay Products Co. v. Brown*, 297 U.S. 227, 229, 56 S.Ct. 450, 450, 80 L.Ed. 655 (1936); *Elliot v. Frontier Properties (In re Shurtleff, Inc.)*, 778 F.2d 1416, 1421 (9th Cir.1985)); *In re Buyer's Club Markets, Inc.*, 123 B.R. 895 (Bankr.D.Colo.1991). I accordingly affirm the bankruptcy court's decision in this respect as well.

D. *Ordinary Course of Business—§ 547(c)(2)*

Balcor's final argument is that the payments were made in the ordinary course of business and did not arise out of unusual debt collection or payment practices. To satisfy the ordinary course of business exception, a creditor must show that the payments were made in the ordinary course of the creditor's business, made according to ordinary business terms, and made in the ordinary course of business. *Union Bank v. Wolas*, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991). The defense is available for both short-term and long-term debt obligations. *Id.* Ordinary course of business payments do not include payments which arise out of an unusual debt collection or payment practice. *Marathon Oil Co. v. Flateau (In re Craig Oil Co.)*, 785 F.2d 1563 (11th Cir.1986); *In re Miniscribe*, 123 B.R. 86 (Bankr.D.Colo.1991). In general, I must look to the parties' earlier business conduct, the common industry practice, and specifically, whether the payment resulted from any unusual action by either the debtor or creditor. *Xtra, Inc. v. Seawinds Ltd. (In re Seawinds Ltd.)*, 888 F.2d 640 (9th Cir.1989); *Courtney v. Octopi, Inc. (In re Colonial Discount Corp.)*, 807 F.2d 594, 600 (7th Cir.1986); *Waldshmidt v. Ranier (In re Fulghum Const. Corp.)*, 872 F.2d 739 (6th Cir.1989).

The bankruptcy court's findings are not clearly erroneous and are supported by the record. First, the parties' earlier conduct did not include an escrow or lockbox arrangement. It only included an ordinary promissory note and deed of trust. The escrow agreements were not entered into at the time of the loans. The one was executed nearly 21 months after the corresponding note, the other nearly fifteen months later. Second, there was little evidence tending to show that such lockbox arrangements were used commercially or within the industry except when a loan was in default, where the lender was preparing to foreclose, or where

there were other lender relationship problems. Finally, the preferential payments clearly resulted from unusual action on both the debtor and creditor's part. The escrow agreements came into being only after the partners were insolvent and in default on their loans as a way to satisfy Balcor that the rents would not disappear without paying Balcor and the other trade creditors. The bankruptcy court properly treated such an arrangement as an unusual collection effort on Balcor's part. I therefore conclude that the bankruptcy court ruled correctly when it refused to dismiss the complaint on the basis that there was no unusual debt collection practice.

III. *The Trustee's Cross-Appeal*

The trustee argues that the bankruptcy court erred when it concluded that Balcor was not a controlling insider within the meaning of § 547(b)(4)(B) and § 101(31). I disagree.

Under 11 U.S.C. § 101(31)(C)(V), an insider includes one who is in control of the debtor. Case law teaches that I must look to the totality of the circumstances to determine when a creditor has assumed control of the debtor. *In re Finn*, 909 F.2d 903 (6th Cir.1990). In order to control a debtor, a creditor must be so powerful that the debtor becomes a mere instrument or agent of the creditor, unable to make independent policy and personnel decisions. The cases distinguish, however, the creditor who merely takes a sentinel-like position vis-a-vis the debtor, thereby keeping careful watch over the borrower's activities. *In re Aluminum Mills Corp.*, 132 B.R. 869 (Bankr.N.D.Ill.1991); *Gray v. Giant Wholesale Corp.*, 758 F.2d 1000 (4th Cir.1985); *In re Practical Investment Corp.*, 95 B.R. 935 (Bankr. E.D.Va.1989).

I agree with the bankruptcy court's conclusion that Balcor had good cause to monitor the partners's expenses and operations, especially since the loans were in default. Beyond that, the partners retained ultimate control of their destiny. They made day-to-day operating and personnel decisions and exercised general control over the business operations. While it may be true in some cases that "he who has his thumb on the purse has the power,"[3] the mere ability to control does not always equate to control within the meaning of 11 U.S.C. § 101(31)(C)(V). I accordingly affirm the bankruptcy court's decision in this regard as well.

DATED at Denver, Colorado this 30th day of September, 1992.

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[3] Otto Von Bismarck, Speech to the North German Reichstag (March 11, 1869) quoted in J. Bartlett Familiar Quotations 553 (E.Beck Ed.1980).

[Dated April 30, 1992]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	Bankruptcy Case No.
	)	89-B-06180-C
MERIDITH HOFFMAN PARTNERS,	)	89-B-06181-E
a Colorado general partnership,	)	
and	)	
MERIDITH MILLARD PARTNERS,	)	
a Nebraska general partnership,	)	
	)	
Debtors.	)	
	)	
----------	)	
	)	
H. CHRISTOPHER CLARK, Trustee	)	
of the Bankruptcy Estates of	)	
Meridith Hoffman Partners and	)	
Meridith Millard Partners,	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding
v.	)	No. 91-1338-SBB
	)	
BALCOR REAL ESTATE	)	
FINANCE, INC.,	)	
an Illinois corporation,	)	
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS COURT, having conducted a one-day trial in this matter, having received and reviewed exhibits, and having examined the file, makes the following findings of fact and

conclusions of law, and issues the following order with respect to the Trustee's claims, pursuant to 11 U.S.C. § 547, against Defendant Balcor Real Estate Finance, Inc.

1. *Meridith Millard Partners.*

Meridith Millard Partners is a general partnership organized under the laws of the State of Nebraska pursuant to an amended partnership Agreement dated January 1, 1985. The general partners of Meridith Millard include Meridith Plaza, Inc., Lawrence E. Fiedler and Greg Rice. During all time periods relevant to the Complaint, Meridith Millard was involved in the business of owning, managing and developing a shopping center known as Millard Plaza located in Omaha, Nebraska. Meridith Millard acquired the Millard Plaza Shopping Center in December 1984, for the approximate sum of $6,250,000.00.

On September 8, 1986, Meridith Millard executed a $5,000,000.00 promissory note and a $300,000.00 promissory note in favor of Balcor ("Balcor-Millard Note"). These notes were secured by a first deed of trust on the Meridith Millard Plaza dated September 8, 1986, and an assignment of rents in favor of Balcor also dated September 8, 1986. The first deed of trust and assignment of rents were recorded in the records of Douglas County, Nebraska. The Balcor-Millard Note was further guaranteed by Lawrence E. Fiedler and the Meridith Organization pursuant to a guaranty of secured promissory note dated September 8, 1986.

On December 1, 1987, Meridith Millard, Balcor, and Jesse N. Lipschuetz, P.C., a Denver attorney, executed an Escrow Agreement. At the time the Escrow Agreement was executed Meridith Millard was in default under the terms of the Balcor-Millard Note.

An Involuntary Petition was filed against Meridith Millard on May 8, 1989.

2. *Meridith Hoffman Partners.*

Meridith Hoffman Partners is a general partnership organized under the laws of the State of Colorado pursuant to an Amended Agreement of General Partners dated January 1, 1985. The general partners of Meridith Hoffman include Mer-Hof, Inc., Lawrence E. Fiedler and Greg Rice. During all time periods relevant to the Complaint, Meridith Hoffman was engaged in the business of owning, managing and developing real property known as the Hoffman Heights Shopping Center, located in Aurora, Colorado.

Meridith Hoffman Partners purchased the property known as the Hoffman Heights Shopping Center located at 606 Peoria Street, Aurora, Colorado from Hoffman Heights Shopping Center, Ltd. in December 1984. Of the $9,037,000.00 purchase price, $5,950,000.00 was financed by a $5,950,000.00 purchase money loan from Hoffman Heights evidenced by a Promissory Note dated December 28, 1984, and secured by a First Deed of Trust and Assignment of Rents on the Hoffman Property ("Hoffman Heights Note"). The remainder of the purchase price was financed by a loan from Balcor in the amount of $3,550,000.00, evidenced by a Promissory Note dated January 30, 1985, payable to Balcor and secured by a Second Deed of Trust and Assignment of Rents ("Balcor-Hoffman Note"). The Deed of Trust and Assignment of Rents was recorded with the Clerk and Recorder for Arapahoe County, Colorado. Lawrence E. Fiedler, a general partner and the Meridith Organization executed guaranties of the Balcor-Hoffman Note dated January 30, 1985.

On October 7, 1986, Balcor and Meridith Hoffman executed a Modification Agreement and an Amended and Restated Secured Promissory Note dated October 8, 1986. On October 3, 1986, Meridith Hoffman, Balcor and Jesse N. Lipschuetz executed an Escrow Agreement. At the time of the execution of the Escrow Agreement, Meridith Hoffman was in default under the terms of the Balcor-Hoffman Note.

An Involuntary Petition was filed against Meridith Hoffman on May 8, 1989.

3. *Escrow Agreements.*

During the time periods relevant to the action, Banc Properties served as property manager for both the Hoffman Heights Shopping Center and the Meridith Plaza Shopping Center. During the periods relevant to the Complaint, both Debtors were operating under the terms of the Escrow Agreements with Balcor. Pursuant to the terms of the Escrow Agreements, the rents from the properties were deposited with Jesse N. Lipschuetz, P.C. Banc would submit disbursement requests of invoices to be paid to Balcor and Jesse N. Lipschuetz, P.C. Balcor would review the disbursement requests and would comment, occasionally question, perhaps reject, or otherwise respond to Mr. Lipschuetz respecting same. Management and operations remained primarily and essentially with Debtors' personnel and Banc. Balcor exercised monitoring and some supervisory responsibilities on matters relating to property finances and expenditures, but the Debtors and Banc Properties remained in control.

4. *Elements of Preferential Transfer.*

A. *Transfers of an Interest of the Debtors in Property to and for the Benefit of a Creditor Under § 547(b)(1).*

The Court finds and the parties have stipulated that during the 90-day period prior to the filing of the bankruptcy, Meridith Millard transferred $50,500.00 to Balcor and further that during the period between 90 days and one year prior to the filing of the bankruptcy, Meridith Millard transferred $201,222.44 to Balcor.

The Court finds and the parties have stipulated that during the 90-day period prior to the filing of the bankruptcy, Meridith Hoffman transferred $18,000.00 to Balcor and further that during the period between 90 days and one year prior to the filing of the bankruptcy, Meridith Hoffman transferred $122,128.94 to Balcor.

The Trustee has asserted that the transfers were made as set forth in the Debtors' Statement of Financial Affairs. This position was adopted by Balcor during its argument at trial. The Court accordingly finds that the transfers were made as follows:

i) Meridith Hoffman within 90 days, $18,000.00 as follows:

03/30/89	$ 8,000.00
04/28/89	$ 10,000.00

ii) Meridith Hoffman within one year, $122,128.94 as follows:

05/16/88	$ 27,572.69
06/14/88	$ 28,491.78
09/06/88	$ 27,572.69
10/14/88	$ 28,491.78
01/09/89	$ 10,000.00

iii) Meridith Millard within 90 days, $50,500.00 as follows:

03/02/89	$ 30,000.00
03/30/89	$ 5,500.00
04/19/89	$ 15,000.00

iv) Meridith Millard within one year, $201,222.44 as follows:

10/27/88	$126,722.44
11/15/88	$ 15,500.00
12/20/88	$ 31,000.00
01/26/89	$ 28,000.00

B. *Payments Made on Account of an Antecedent Debt Pursuant to § 547(b)(2).*

The Court finds and the parties have stipulated that the transfers were made on account of antecedent debts owed by the Debtors before the transfers were made.

C. *The Transfers Were Made While the Debtors Were Insolvent Pursuant to § 547(b)(3).*

On February 21, 1992, Balcor and the Trustee filed a Joint Pre-Trial Statement in which the parties stipulated that the transfers were made while the Debtors were insolvent. On March 12, 1992 (six days before trial), Balcor advised the Trustee that it no longer stipulated to the issue of insolvency. The Court finds that Balcor is properly bound by its stipulation of insolvency pursuant to Rule 7016(e), Fed.R.Bankr.P., and *Eastman Kodak Co. v. Westway Motor Freight*, 758 F.Supp. 641 (D.Colo. 1991). This Court, therefore, finds that the transfers were made while the Debtors were insolvent pursuant to Section 547(b)(3).

D. *Preference Period Pursuant to § 547(b)(4).*

1. *The Payments Were Made for the Benefit of Insiders-Guarantors and the Preference Period is, Thus, One Year Under Applicable Case Law.*

Pursuant to Section 547(b)(4), this Court finds that the preference period is properly extended to a year under 11 U.S.C. § 547(b)(4) under *In re Robinson Bros. Drilling, Inc.*, 97 B.R. 77 (W.D.Okla. 1988) *aff'd* 892 F.2d 850 (10th Cir. 1989). The Court finds that the payments to Balcor were made to or for the benefit of insiders who were guarantors of the Debtors. The parties have stipulated that Lawrence Fiedler is a general partner of the Debtors. The Court further finds that Meridith Organization is an insider of the Debtors. The guaranties were submitted as Trustee's Exhibits B and V.

The Court finds that Balcor's argument that the guarantors did not receive a benefit from the transfers because they were insolvent is without merit. As stated in *In re Octagon Roofing*, 124 B.R. 522, 532 (Bankr. N.D.Ill. E.D. 1991), there is nothing in the holding of *Levit v. Ingersoll Rand Financing Corp.*, 874 F.2d 1186 (7th Cir. 1989) (commonly known as the *DePrizio* case) or the cases following it which requires that the benefit to an insider be a direct monetary benefit.[1] Rather, a guarantor is benefited by forbearance of a lender in executing on the notes and guaranties and/or by the reduction of the outstanding liability.

The benefit to the guarantors is shown by the fact that since the payments were made, Balcor did not foreclose on

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[1] This Court recognizes the controversial nature of the *DePrizio* opinion and cases which follow it, as well as pending legislation in Congress to set aside the principles of this preference doctrine. Nonetheless, the case law in the Tenth Circuit is now clear and controlling in this matter.

the property or bring suit on the guaranties until after entry of the orders for relief from stay. The benefit is further evidenced by the Trustee's Exhibits DDDD, EEEE and FFFF which show that the release of the guaranties was a primary concern of the general partner guarantors during the year prior to the filing of the bankruptcy and were a primary issue in the negotiations for the return of the properties. The guarantors obviously believed there was a benefit to the release of the guaranties. These exhibits show that the guaranties were an issue of concern to both sides and that the guarantors received a benefit by the payments. The Court finds that this benefit was established by the Trustee and the preference periods are properly extended to a year.

2. *Balcor is Not an Insider as a Result of Qualifying as a "Person in Control of the Debtor".*

The Court finds that the preference period is not Properly extended to a year, as argued by Plaintiff, because Balcor was purportedly an insider under 11 U.S.C. §§ 101(31)(C) and 547(b)(4)(B). Section 101(31) defines "insider" to include a person who is in control of the debtor.

A trustee has the burden of proving that a creditor is an insider of the debtor in order to extend the preference period. 11 U.S.C. § 547(g). Section 101(31)(C) of the Bankruptcy Code defines an insider as: (i) a general partner in the debtor; (ii) a relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor. 11 U.S.C. § 101(31)(C).

In order to determine whether a creditor assumed "control" of a debtor, a court must examine the totality of the circumstances. *See, In re Finn*, 909 F.2d 903, 909 (6th Cir.

1990); *In re Classic Drywall, Inc.*, 121 B.R. 69 (D.Kan. 1990); *Matter of Cavalier Homes of Georgia Inc.*, 102 B.R. 878, 883 (Bankr. M.D.Ga. 1989); *In re Beverages Int'l, Ltd.*, 50 B.R. 273, 282 (Bankr. D.Mass. 1985).

For a creditor to control a debtor, a creditor's conduct must be powerful and dominant, such that a debtor is rendered a mere instrumentality or incapable of making independent policy decisions. *See, In re Aluminum Mills Corp.*, 132 B.R. 869, 894 (Bankr. N.D.Ill. 1991); *In re Badger Freightways, Inc.*, 106 B.R. 971, 982 (Bankr. N.D.Ill. 1989); *In re Practical Investment Corp.*, 95 B.R. 935, 941 (Bankr. E.D.Va. 1989) (relationship must involve considerable control on the part of the creditor deemed to be an insider); *In re Sleepy Valley, Inc.*, 93 B.R. 925 (Bankr. W.D. Tex. 1988); *In re T.E. Mercer Trucking Co.*, 16 B.R. 176 (Bankr. N.D.Tex. 1981). The legislative history to Section 101(31) of the Bankruptcy Code further provides that an insider is one who does not deal at arms-length with a debtor. H.R. Rep. No. 595, 95th Cong., 1st Sess. 312 (1977).

A creditor will not be considered to control a debtor if the creditor merely exercises a "careful watch" over its borrower's activities. *See, Gray v. Giant Wholesale Corp.*, 758 F.2d 1000, 1003 (4th Cir. 1985) (creditor was not an insider or person in control simply because it controlled dispensation of a debtor's checks); *In re W.T. Grant Co.*, 699 F.2d 599, 610-611 (2nd Cir. 1983); *Practical Investment Corp., supra* at 941 (exercise of formal control incident to debtor-creditor relationship does not make creditor an insider); *In re Technology for Energy Corp.*, 56 B.R. 307, 316 (Bankr. E.D.Tenn. 1985) (court did not find "control" where creditor did not control contracts or personnel decisions, and was not involved in scheduling or purchase order decisions). *See also, Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990) (Seventh Circuit Court of Appeals held that a creditor did not engage in im-

permissible control where the creditor merely enforced the terms of its loan documents to the letter); *Matter of Clark Pipe and Supply Co., Inc.*, 893 F.2d 693 (5th Cir. 1990) (Fifth Circuit Court of Appeals held that a creditor did not exercise improper control where creditor made no management decisions and borrower handled daily operations).

This Creditor exercised a "careful watch;" it did not exercise control and effective management of policy and operations of the Debtors. Parsing through the evidence submitted by the Plaintiff on this issue reveals two principal items. First, the Creditor, Balcor, had good cause to carefully monitor operations and expenses of the Debtors, which it did diligently. Second, the Debtors retained and exercised ultimate authority and operational control over the Debtors; Debtors did not, it appears, cede authority or relegate control to Balcor. This Creditor did not, in its watch, usurp control over the Debtors' businesses and finances.

3. *The Transfers Enabled Balcor to Receive More Than it Would Have Received Under Chapter 7 Pursuant to 11 U.S.C. § 547(b)(5).*

The Court finds that the Trustee has established that Balcor received more than it would have received in a case under Chapter 7. The Court finds that Balcor's arguments that it did not receive more than it would have in a Chapter 7 because it had a perfected security interest in the rents are without merit. Balcor asserts that the filing of the Assignment of Rents perfected its interest in the rents. This is contrary to the Court's prior rulings and the case law.

The evidence is clear that on the date of filing of the Petitions, Balcor was a nonrecourse creditor of both estates and accordingly in a Chapter 7 would not be entitled to any payment on an unsecured claim. The evidence further shows that at all times relevant to these proceedings,

Balcor was an undersecured creditor. The fact that at the filing of the Petition Balcor was an undersecured creditor is shown by the proofs of claim filed by Balcor in the bankruptcy proceedings showing in the Meridith Millard case an unsecured claim of $5,024,759.84 and in the Meridith Hoffman case an unsecured claim of $1,429,223.58.

The Court finds in accordance with *In re Lewis W. Shurtleff, Inc.*, 778 F.2d 1416 (9th Cir. 1985); *In re Buyer's Club Markets, Inc.*, 123 B.R. 895 (Bankr. D.Colo. 1991) that as long as the distributions in a Chapter 7 bankruptcy proceeding are less than 100%, payment to an unsecured creditor enables it to receive more than it would have received in a Chapter 7. The Court further finds that with an undersecured creditor, payments are credited first to the unsecured portion of the debt, *Drabkin v. A.I. Credit Corp.*, 800 F.2d 1153 (D.C. Cir. 1986); *In re Fitzgerald*, 49 B.R. 62 (Bankr. D.Mass. 1985).

The uncontroverted testimony of the Trustee, H. Christopher Clark, clearly shows that in these cases the payments to the unsecured creditors will be less than 100 percent.

The Court finds that although Balcor had recorded Assignments of Rents, Balcor did not perfect its interest in the rents until the post-petition filing of its notices pursuant to 11 U.S.C. § 546(b). The issue as to when the interest in rents was perfected was previously decided in the Meridith Millard case and the Court takes judicial notice of Judge Charles E. Matheson's finding that the Assignments of Rents were perfected as of the date of filing of the Section 546(b) notice. The Court further finds that Balcor is bound by its Agreed Order in the Meridith Millard case, Exhibit GGGG. In the Meridith Hoffman case, the Court finds that under Colorado law, Balcor did not perfect its interest in the rents until the filing of the Section 546(b) notice pursuant to *Consolidated Capital Income Trust v. Colter, Inc.*,

47 B.R. 1008 (D.Colo. 1985), citing *Fisher v. Norman Apartments, Colorado Nat'l Bank of Denver*, 101 Colo. 173, 72 P.2d 1092 (1937). It is clearly established under Colorado law that the filing of an assignment of rents does not perfect an interest in the rents. The evidence shows that Balcor did not take any action legally sufficient to perfect its interest pre-petition. *In re Jefferson Business Center Associates*, 135 B.R. 676 (Bankr. D.Colo. 1992); *In re Morning Star Ranch Resorts*, 64 B.R. 818 (Bankr. D.Colo. 1986).

The Court finds that the payments made should be applied to the unsecured portion of the claims. Since the payments to creditors are to be less than 100 percent, and Balcor is a nonrecourse creditor, the Trustee has met his burden under 11 U.S.C. § 547(b)(5). The Court finds that the transfers are voidable preferences under 11 U.S.C. § 547(b).

4. *The Transfers Were Not Made in the Ordinary Course of Business.*

Balcor has asserted that the payments were made under the ordinary of business pursuant to 11 U.S.C. § 547(c)(2). A finding that the payments were in the ordinary course requires a showing that they were made in the ordinary course of the Debtors' business, made in the ordinary course of the creditor's business, made according to ordinary business terms, and made in the ordinary course of business. *Union Bank v. Wolas*, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991). The Court finds that Balcor has failed to meet its burden of proof on this issue.

Payments which arise out of unusual debt collection or payment practices do not fall within the scope of 11 U.S.C. § 547(c)(2). *In re Craig Oil Co.*, 785 F.2d 1563 (11th Cir. 1986) (cited in *In re Miniscribe*, 123 B.R. 86 (Bankr. D.Colo. 1991)); *In re LCO Enterprises*, 116 B.R. 188 (Bankr. N.D. Cal. 1990); *In re Pioneer Technology, Inc.*, 107 B.R. 698 (9th

Cir. BAP 1988); *In re Bob Grissett Golf Shoppes, Inc.*, 78 B.R. 787 (Bankr. E.D.Va. 1987).

Balcor admitted in its Brief opposing the Trustee's Motion for Summary Judgment that the loans were in default at the time of the execution of the Escrow Agreements. The Court finds that the Escrow Agreements comprise an unusual debt collection practice utilized by Balcor to help protect its claims once the loans were in default. The Escrow Agreements fall outside the ordinary course of business exception. They were not "ordinary course" as to Balcor, to the parties' business relationship, as well as to ordinary business terms, custom or practice.

There is no evidence before the Court that establishes it is in the ordinary course of business between a debtor and a lender to operate under Escrow Agreements of this nature or lock box-type arrangements unless the loans are in default. The Court further finds that if the Escrow Agreements were in the ordinary course of business between the Debtors and Balcor that the Escrow Agreements would have been entered into at the outset of the loans, not when the loans were in default. Although the Balcor-Hoffman Note was executed on January 30, 1985, the Escrow Agreement was not entered into until October 3, 1986. Despite the fact that the Escrow Agreement for Meridith Hoffman was executed in October 1986, the Meridith Millard Escrow Agreement was not executed until December 1, 1987. The Court accordingly finds that the Escrow Agreements and therefore the payments made thereunder were not in the ordinary course of business and were not made according to ordinary business terms and therefore that Balcor has failed to establish its burden of proof to establish the defense under 11 U.S.C. § 547(c)(2).

In applying an analysis utilized in *In re Miniscribe*, *supra*, Balcor has not presented any credible and persua-

sive evidence that the loans were incurred and the payments made in the ordinary course of the Debtors' business. The Court further finds that the payments were not made in the ordinary course of business under 11 U.S.C. § 547(c)(2). As noted in *Miniscribe*, the intent of Section 547(c)(2) is to protect "recurring customary credit transactions that are incurred or paid in the ordinary course of business of the Debtor and the Debtor's transferee." (Collier on Bankruptcy, ¶ 547.10 (15th Ed. 1990)).

For the reasons set forth above, it is

ORDERED that the transfers to Balcor in the amount of $140,128.94 by Meridith Hoffman are preferential transfers pursuant to 11 U.S.C. § 547(b) and Balcor shall, within 30 days of the date this Order becomes final and non-appealable, return to Meridith Hoffman the $140,128.94 it received plus interest at the statutory rate from the date of the transfers.

IT IS FURTHER ORDERED that the transfers to Balcor in the amount of $251,722.44 by Meridith Millard are preferential transfers pursuant to 11 U.S.C. § 547(b) and Balcor shall, within 30 days of the date this Order becomes final and non-appealable, return to Meridith Millard the $251,722.44 it received plus interest at the statutory rate from the date of the transfers.

IT IS FURTHER ORDERED that judgment shall enter accordingly.

Dated this 30th day of April, 1992.

BY THE COURT:

Sidney B. Brooks
United States Bankruptcy Judge

[Dated April 30, 1992]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	Bankruptcy Case No.
	)	89-B-06180-C
MERIDITH HOFFMAN PARTNERS,	)	89-B-06181-E
a Colorado general partnership,	)	
and	)	
MERIDITH MILLARD PARTNERS,	)	
a Nebraska general partnership,	)	
	)	
Debtors.	)	
	)	
----------	)	
	)	
H. CHRISTOPHER CLARK, Trustee	)	
of the Bankruptcy Estates of	)	
Meridith Hoffman Partners and	)	
Meridith Millard Partners,	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding
v.	)	No. 91-1338-SBB
	)	
BALCOR REAL ESTATE	)	
FINANCE, INC.,	)	
an Illinois corporation,	)	
	)	
Defendant.	)	

JUDGMENT

The above-captioned matter came to trial before the Court regarding the Plaintiff/Trustee's claims against Defendant.

The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment shall enter in favor of the Plaintiff against the Defendant for preferential payments in the following amounts:

i) Meridith Hoffman within 90 days, $18,000.00 as follows:

03/30/89	$ 8,000.00
04/28/89	$ 10,000.00

ii) Meridith Hoffman within one year, $122,128.94 as follows:

05/16/88	$ 27,572.69
06/14/88	$ 28,491.78
09/06/88	$ 27,572.69
10/14/88	$ 28,491.78
01/09/89	$ 10,000.00

iii) Meridith Millard within 90 days, $50,500.00 as follows:

03/02/89	$ 30,000.00
03/30/89	$ 5,500.00
04/19/89	$ 15,000.00

iv) Meridith Millard within one year, $201,222.44 as follows:

10/27/88	$126,722.44
11/15/88	$ 15,500.00
12/20/88	$ 31,000.00
01/26/89	$ 28,000.00

Dated this 30th day of April, 1992.

FOR THE COURT:

Bradford L. Bolton, Clerk

By:_____
Deputy

APPROVED AND ACCEPTED:

By:_____
Sidney B. Brooks
U.S. Bankruptcy Judge

11 U.S.C. ¶ 547

§ 547. Preferences

***

(c) The trustee may not avoid under this section a transfer-

(1) to the extent that such transfer was-

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was-

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor-

(A) to the extent such security interest secures new value that was-

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor-

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of-

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

***

Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1682

In The

Supreme Court of the United States

October Term, 1993

BALCOR REAL ESTATE HOLDINGS, INC., f/k/a BALCOR REAL ESTATE FINANCE, INC.,

Petitioner,

v.

H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

H. CHRISTOPHER CLARK, Trustee of
the Bankruptcy Estates of
Meridith Hoffman Partners and
Meridith Millard Partners,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. INTRODUCTION

H. Christopher Clark, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners, a Colorado general partnership (hereinafter "Hoffman") and Meridith Millard partners, a Nebraska general partnership (hereinafter "Millard") commenced this case as an adversary proceeding in the United States Bankruptcy Court for the

District of Colorado. H. Christopher Clark serves as the Chapter 7 Trustee for both the Hoffman and Millard bankruptcy estates. The Hoffman and Millard estates are not substantively consolidated nor are the cases jointly administered.

The Trustee commenced this case to recover under 11 U.S.C. § 547(b) preferential transfers by Hoffman and Millard to Balcor Real Estate Finance, Inc. now known as Balcor Real Estate Holdings, Inc. (hereinafter "Balcor") within one year prior to the filing of the bankruptcy petitions. The Complaint requested that judgment enter in favor of the Hoffman Estate in the amount of $140,128.94 and that judgment enter in favor of the Millard Estate in the amount of $251,722.44.

The Bankruptcy Court held that the transfers to Balcor by Hoffman and Millard within the year prior to the filing of the petitions were voidable preferences under 11 U.S.C. § 547(b). The Bankruptcy Court further held that Balcor failed to meet its burden of proof to sustain its ordinary course of business defense under 11 U.S.C. § 547(c)(2). Accordingly, the Bankruptcy Court entered judgment in favor of the Trustee for the recovery of the transfers as requested in the Complaint. The Bankruptcy Court's decision was affirmed on appeal by the United States District Court for the District of Colorado and subsequently affirmed by the United States Court of Appeals for the Tenth Circuit.

II. THE LOAN TRANSACTIONS

A. Execution of the Escrow Agreements

The critical issue raised in the case concerning Balcor's ordinary course of business defense was whether payments made under certain escrow agreements between Balcor, the Debtors and an escrow agent, met the requirements of 11 U.S.C. § 547(c)(2).[1] Under the escrow agreements, all rents received from the Debtors' real properties were deposited into an escrow account maintained by the escrow agent, Jesse N. Lipschuetz, P.C. Balcor's prior written consent was required before any disbursements of any amount could be made from the escrow accounts.

The evidence established the escrow agreements were not executed until the Balcor loans were in default. Although the Hoffman Note was executed on January 30, 1985, the Hoffman Escrow Agreement was not executed until October 3, 1986, twenty months later. The Millard Note was executed on September 8, 1986, however, the Millard Escrow Agreement was not executed until December 1, 1987, fifteen months later. Despite the fact the Millard Note was executed less than a month before the execution of the Hoffman Escrow Agreement, the

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[1] At the time of the transfers, Balcor did not have a perfected security interest in the rents or receivables of the Debtors. Although both Hoffman and Millard executed an Assignment of Rents in favor of Balcor, Balcor did not perfect the assignment of rents against either Debtor under controlling state law until it filed notices pursuant to 11 U.S.C. § 546(b) after the filing of the Bankruptcy petitions.

Millard Escrow Agreement was not executed until sixteen months after the Hoffman Escrow Agreement.

The evidence established that Hoffman and Millard were delinquent in making payments and were in default at the time of the execution of their respective escrow agreements. Michael Doyle, who served as Vice President, Property Management for Banc Properties Services, Inc., the property manager, testified that although he did not know if Balcor had formally declared the loans in default, at the time each escrow agreement was executed, the Debtor was delinquent in making payments.

Balcor failed to meet its burden of proof to establish that the payments under the escrow agreements were made in the ordinary course of business. The evidence established that within the commercial real estate industry, escrow agreements, such as those executed by Hoffman and Millard, are executed only when loans are in default and as a means to prevent the lender from foreclosing. Greg Rice, President, Banc Properties Services, Inc., testified that during the relevant time period he was involved in the management of approximately 125 commercial properties and that a majority of the properties he managed were financed by a commercial lender. Mr. Rice testified that of these properties less than 10% operated under an escrow agreement and further the escrow agreements arose only in cases where the lender was about to foreclose or there were other lender relationship problems. Mr. Rice further testified that it was not ordinary or routine for the Meridith Organization[2] and other property

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[2] The Meridith Organization, was a general partner of Hoffman and Millard as well as eight or nine other partnerships,

owners to enter into escrow agreements unless there were lender relationship problems.

B. Operation Under the Escrow Agreements

Under the escrow agreements, Balcor controlled the timing and amount of all payments made by Hoffman and Millard. The escrow agent collected all rents from the Debtors" real properties, and then deposited them in two separate escrow accounts maintained by the escrow agent. Periodically, Banc Properties Services, Inc., the property manager, forwarded disbursement requests, including invoices and checks to the escrow agent and Balcor. The disbursement requests included payments to trade creditors as well as mortgage payments. Under the escrow agreements, no disbursements were made on behalf of either Hoffman or Millard without the prior written consent of Balcor.

The evidence showed that Balcor exercised its powers under the escrow agreements for its own benefit by controlling the disbursement of accounts payable and the timing of payments.[3] Balcor utilized its rights under

---

including partnerships which owned and managed commercial real estate, namely shopping centers.

[3] Balcor argues in footnote 5 of the Petition for Writ of Certiorari that the Tenth Circuit's decision did not acknowledge the findings of the bankruptcy court and district court that Balcor did not exercise sufficient control to be found to be an insider under 11 U.S.C. § 101(31). In finding that Balcor was not an insider the lower courts determined that the control over the financial affairs was not tantamount to control over the debtors operations. The conclusion that Balcor was not an insider under

the Escrow Agreements to: 1) require Millard and Hoffman to bring the Balcor loans current before it would authorize payments to any other creditors; 2) insure the mortgage payments were made prior to payments to trade creditors resulting in significant delays in payments to vendors, 3) direct the amount of leasing commissions and management fees which could be paid by the Debtors and 4) disallow legal fees earned in connection with the properties.[4]

The evidence established that Balcor utilized its disbursement control over the Debtors to ensure that its mortgage payments were paid prior to payments to trade creditors by delaying the timing of the approval of the disbursement requests to trade creditors. The Trustee introduced evidence which showed disbursement requests dated May 6 and May 13, 1988, which requested approval to make a mortgage payment to the first deed of trust holder, a mortgage payment to Balcor and payments to trade creditors. The payments to the mortgage lenders under these requests were approved and made within five days on May 11 and May 17, 1988, respectively, however, the disbursements to the trade creditors were not approved until July 1, 1988. The evidence established

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11 U.S.C. § 101(31) does not, however, preclude the Court's finding that Balcor held financial control of the Debtors under the escrow agreements, as the two are not mutually exclusive.

[4] Balcor continues to argue in footnote 5 of the Petition for Writ of Certiorari its rendition of the facts which it asserts the Tenth Circuit failed to consider. The Tenth Circuit viewed the record, including the facts asserted by Balcor, and determined that the factual conclusions of the Bankruptcy Court, affirmed by the District Court, were not clearly erroneous.

that Balcor used its disbursement authority to prefer itself in the Hoffman case to ensure that the mortgage payments were paid six weeks prior to the disbursements to the trade creditors.

III. THE OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the bankruptcy court and the district court based on its determination that the factual findings were not clearly erroneous. The Tenth Circuit stated:

> Because this conclusion is primarily factual, we must accept it unless it is clearly incorrect.

12 F.3d at 1553. Petition App. 3.

The Tenth Circuit noted that the legislative history reflects that the purpose of the ordinary course of business exception is:

> "to leave undisturbed normal financing transactions, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy."

12 F.3d at 1553, Petition App. 4 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), 1978 U.S.C.C.A.N. 5787, 5874).

The Tenth Circuit further stated:

> The preference section does not discourage "unusual action" simply because others in the

> industry wouldn't respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out.

12 F.3d at 1553, Petition App. 4-5.

The Tenth Circuit held the record supported the factual findings upon which the bankruptcy court relied in holding that Balcor failed to sustain its burden of proof under Section 547(c)(2). The Tenth Circuit concluded that the escrow arrangement was not a normal financing relationship and that creditors in the industry used such arrangements only in extraordinary circumstances. The Tenth Circuit stated:

> The escrow arrangement with Balcor was not a normal financing relationship. The record shows that creditors in the industry use such an arrangement only in extraordinary circumstances, when debtors are in trouble. (record citation omitted). The record also suggests that Balcor entered the escrow agreement with the debtors because the debtors were delinquent and Balcor was worried about getting paid. (record citation omitted). **Furthermore, the escrow agreement enabled Balcor to favor itself**. Balcor occasionally used this power to make sure that money was available for itself by denying other payments. **The record supports the finding that Balcor used its authority to delay payments to other creditors and to pay its mortgage first. (record citation omitted). Balcor also conditioned payments to trade creditors upon receipt of payments to itself and denied payment of certain expenses.**

> (record citation omitted). **The payments therefore were made according to terms that were not used in normal or ordinary situations and that made it possible for Balcor to favor itself, thus increasing the risk of bankruptcy as well.**

12 F.3d at 1554, Petition App. 5-6. (emphasis added).

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I.

THE DECISION BELOW HAS NOT CREATED A SPLIT IN THE CIRCUIT AUTHORITY IN THE INTERPRETATION AND APPLICATION OF 11 U.S.C. § 547(c)(2).

The premise of Balcor's Petition for Writ of Certiorari is that the decision below directly contradicts authorities on point from the Seventh, Eighth and Fourth Circuits citing *Matter of Tolona Pizza Products Corp.*, 3 F.3d 1029 (7th Cir. 1993); *Jones v. United Sav. and Loan Assn. (In re U.S.A. Inns of Eureka Springs, Arkansas, Inc.)*, 9 F.3d 680 (8th Cir. 1993); *Harman v. First American Bank of Maryland (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479 (4th Cir. 1992). A careful reading of the relevant decisions shows that the Tenth Circuit's decision does not create a split of authority in the circuits of the type requiring this Court's review. To the extent the decision below is distinguishable from the cited decisions, the distinction is primarily due to factual differences. Since the ordinary course of business defense under 11 U.S.C. § 547(c)(2) is a factually driven determination, the alleged legal distinctions, argued by Balcor, in the tests for the application of Section 547(c)(2)(C) and the phrase "ordinary business

terms" are not material. This is particularly true in this case as Balcor would have failed to meet its burden of proof that the escrow agreements did not violate the policies behind the preference statute under the interpretation used by any of the Courts. Due to the fact that this is a primarily factual determination with the same result under any interpretation, there are no special and important reasons for this Court to grant certiorari.

Each of the Circuit Courts begin their interpretation of 11 U.S.C. § 547(c)(2) with the legislative history which provides:

> The purpose of this exception is to leave undisturbed normal financial relations because it does not detract from the general policy of the section to discourage unusual action by either the debtor or his creditors during the debtors slide into bankruptcy.

S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), 1978 U.S.C.C.A.N. 5787, 5874.

The Tenth Circuit and the other Circuit Courts agree that the preference section:

> "discourages unusual action that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out."

In re Meridith Hoffman Partners, 12 F.3d at 1553 (citing *Matter of Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993) and *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 488 (4th Cir. 1992). See also *Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217 (3rd Cir. 1994).

The Seventh Circuit in *Matter of Tolona Pizza Products Corp.*, stated:

> The purpose of the preference statute is to prevent the debtor during his slide toward bankruptcy from trying to stave off the evil day by giving preferential treatment to his most importunate creditors, who may sometimes be those who have been waiting the longest to be paid. Unless the favoring of particular creditors is outlawed, the mass of creditors of a shaky firm will be nervous, fearing that one or a few of their number are going to walk away with all the firm's assets; and this fear may precipitate debtors into bankruptcy earlier than is socially desirable.

3 F.3d at 1032 (citations omitted).

The Circuit Courts concur that the application of the ordinary course of business defense is primarily a factual determination. *In re Meridith Hoffman Partners*, 12 F.3d at 1553; *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d at 683; *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d at 486. *Waldschmidt v. Ranier (In re Fulghum Construction Corp.)*, 872 F.2d 739, 743 (6th Cir. 1988).

The Tenth Circuit's decision that Balcor failed to establish that payments made under the escrow agreements were made pursuant to "ordinary business terms" under 11 U.S.C. § 547(c)(2)(C) was based upon its conclusion the record supported the factual determinations of the courts below that the escrow agreements were not usual financing transactions and that the escrow agreements created a situation in which Balcor had the ability,

which it exercised, to favor itself. These factual determinations comprise the distinguishing factor, if there is one, between the decision below and the decisions of the other Circuit Courts. The majority of the cases cited by Balcor are factually distinguishable as they do not involve unusual collection practices but rather concern the timing of payments to unsecured creditors without disparate treatment to a particular creditor. In *Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217 (3rd Cir. 1994), the one case cited by Balcor which dealt with issues beyond timing of payments, the Court also concluded that by instituting a payment plan and mounting pressure to increase the payments, the creditor had failed to meets its burden of proof under the ordinary course of business defense.

In order to support a perceived conflict between the Circuit Courts, Balcor isolates a single statement in the Tenth Circuit's opinion, disregarding the substance of its decision. Balcor asserts that the Tenth Circuit has imposed a "healthy business" requirement which contradicts the opinions of other Circuit Courts that measure ordinariness within an industry which routinely deals with businesses in trouble.

The Tenth Circuit relied on the very decisions which Balcor asserts create a divisive split in circuit authority. The Tenth Circuit concurred with and cited the Seventh Circuit's decision in *Tolona Pizza Prods. Corp.* and the Fourth Circuit's decision in *In re Jeffrey Bigelow Design Group, Inc.* when it held:

> The preference section does not discourage "unusual action" simply because others in the industry would not respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out.

In re Meridith Hoffman Partners 12 F.3d at 1553.

The focus of the Tenth Circuit's analysis as to whether Balcor sustained its burden of proof under Section 547(c)(2)(C) was whether the escrow agreements and Balcor's enforcement of its rights thereunder, raised the dangers that the preference section seeks to avoid. While the Tenth Circuit noted that terms used in healthy debtor/creditor relationships do not raise the dangers that the preference section seeks to avoid, namely inequitable treatment of creditors, it did not, as Balcor suggests, make a "healthy relationship" a requirement of Section 547(c)(2). The Tenth Circuit recognized that arrangements required by creditors conducting business with struggling debtors *may* give a creditor an advantage and precipitate bankruptcy. In other words, the Tenth Circuit concluded that debtor/creditor relationships established while a Debtor is struggling require scrutiny to determine whether the policies of the preference section have been met. The Tenth Circuit did not limit the availability of the ordinary course of business defense only to healthy relationships but rather held that terms which are not utilized in healthy relationships will require scrutiny and not meet the requirements of 11 U.S.C. § 547(c)(2)(C) unless it is established that the terms do not conflict with

the policies of the preference section and therefore do not confer an undue advantage upon the creditor.[5]

The Tenth Circuit's analysis is consistent with the legislative history and the decisions rendered by the other Circuit Courts. Each of the Circuit Courts recognize that the ordinary course of business defense applies to normal terms, not unusual transactions. The distinguishing factor in the case below is that the record established that the escrow agreements enabled Balcor to favor itself, which Balcor in fact did. This is consistent with the recognition of the other Circuit Courts that the ordinary course of business defense is not available where a particular creditor is favored. The Seventh Circuit in *Matter of Tolona Pizza Products Corp.* specifically found that there was no hint that the dealings were designed to favor the particular creditor. 3 F.3d at 1033. Similarly the Fourth Circuit in *In re Jeffrey Bigelow Design Group, Inc.* stated that:

> Congress was concerned that creditors would race to the courthouse to dismember the creditor or that a debtor would favor certain creditors over others, and by enacting the ordinary course exception, Congress wished to except normal transactions which do not promote these two concerns.

956 F.2d at 488.

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[5] This construction of the Tenth Circuit's decision is consistent with the Tenth Circuit's recognition that while the filing of a lawsuit to enforce a debt may not be unusual when a debtor does not pay, payments under a settlement agreement are not made according to ordinary business terms citing *Gull Air, Inc. v. Beech Acceptance Corp. (In re Gull Air)*, 82 B.R. 1, 3-4 (Bankr. D. Mass. 1988).

The Eighth Circuit recognized that dealings which are extraordinary fall outside of the provisions of 547(c)(2)(C). *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d 680, 685 (8th Cir. 1993).

The Tenth Circuit acknowledged that there are two possible interpretations of the phrase "ordinary business terms" since the phrase is not defined by the Bankruptcy Code. First, terms used by creditors in similar situations, even if the situation itself is extraordinary (citing *Jones v. United Sav. & Loan Ass'n (In re U.S.A. Inns of Eureka Springs, Arkansas)*, 9 F.3d 680, 685 (8th Cir. 1993) or second, terms used in usual or ordinary situations. *In re Meridith Hoffman Partners*, 12 F.3d at 1553. The Tenth Circuit concluded that the latter interpretation supported the purposes of the preference section. The Tenth Circuit's decision was followed by the Third Circuit in *Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, 18 F.3d 217 (3rd Cir. 1994).

Balcor argues that the Tenth Circuit's decision is irreconcilable with the Eighth Circuit's decision in *In re U.S.A. Inns of Eureka, Arkansas*, 9 F.3d 680 (8th Cir. 1993), which held the terms are analyzed in the context of creditors dealing with the same or similar problems. Although the Tenth and Eighth Circuits have defined the phrase "ordinary business terms" differently, this distinction does not set forth a conflict between the circuits where special and important reasons require that this Court grant the Petition for Writ of Certiorari, because

under either interpretation of the phrase "ordinary business terms", the Court would have reached the conclusion that Balcor failed to sustain its burden of proof as the escrow agreements were found to benefit Balcor to the detriment of other creditors, in contravention of the policies of the preference section and the legislative history. The Tenth Circuit determined that these factual findings were supported by the record and were not clearly erroneous.

The Eighth and Tenth Circuits concur that the decision as to whether the ordinary course of business defense applies is primarily a factual determination. *In re U.S.A. Inns of Eureka, Arkansas*, 9 F.3d at 683; *In re Meridith Hoffman Partners*, 12 F.3d at 1553. The Eighth Circuit stated:

> This court has indicated that "there is no precise legal test which can be applied in determining whether payments by the debtor during the 90-day period were, 'made in the ordinary course of business'; 'rather th[e] court must engage in a "peculiarly factual" analysis.' "

9 F.3d at 682-683 (citation omitted).

Even if the Tenth Circuit had followed the analysis applied by the Eighth Circuit, based on the factual conclusions that the escrow agreements enabled Balcor to favor itself, the Court would have reached the conclusion the ordinary course of business defense was inapplicable. The real distinction between this case and *In re U.S.A. Inns of Eureka, Arkansas* is that *In re U.S.A. Inns* dealt only with issues of delayed payments found to be ordinary within the industry, as opposed to an unusual collection

practice conveying financial control of the debtor to a single creditor, which was not an ordinary business term within the industry. The decisions of the Eighth and Tenth Circuits are not irreconcilable and do not raise special and important issues requiring resolution by this Court.

The Third Circuit Court of Appeals in *In re Molded Acoustical Products, Inc.*, 18 F.3d 217 (3rd. Cir. 1994), recognized that the decision as to whether the ordinary course of business defense has been established is a factual determination which must be analyzed in each case. Balcor argues that the Third Circuit's decision reinforces the fundamental split in authority between the circuits. To the contrary, the Third Circuit notes that the issue involves a factual determination which eschews a bright line approach and must be considered in each case. The Third Circuit adopted the definition of ordinary business terms utilized by the Seventh Circuit, and followed by the Tenth Circuit. The Third Circuit recognized that the Seventh, Eighth, and Tenth Circuits have all held that the preference provisions are designed not to disturb normal debtor-creditor relationships but rather to derail unusual ones which threaten to heighten the risk of bankruptcy and disrupt the paramount policy of equitable treatment of creditors. The Third, Eighth and Tenth Circuits all follow the Seventh Circuit's analysis in *Matter of Tolona Pizza Products Corp.*

Balcor also argues that there is a conflict between the Seventh and Tenth Circuits in the priority afforded Section 547(c)(2)(C). Balcor asserts that the Seventh Circuit has determined that the ordinary business terms element

in Section 547(c)(2) is a lesser element in the determination than the Section 547(c)(2)(B) element and that therefore the Tenth Circuit has inverted that priority by concluding that Section 547(c)(2)(C) could not be met and therefore the defense is inapplicable. First, there is no basis in the statutory language or this Court's decision in *Union Bank v. Wolas*, ___ U.S. ___, 112 S. Ct. 527, 533, 116 L. Ed.2d 514 (1991), which supports the argument that (C) is a lesser element. The statute requires that all three elements of Section 547(c)(2) must be met. Second, Balcor misstates the analysis applied by the Seventh Circuit. While the Seventh Circuit commenced its analysis by stating that one interpretation is that the most important factor is the relationship between the parties, the Seventh Circuit rejected this interpretation, acknowledging that under the analysis advocated by Balcor the (C) element would add nothing to the first two subsections. The Seventh Circuit concluded that the creditor must show that the payment received was made in accordance with ordinary business terms in the industry. *Matter of Tolona Pizza Prods.*, 3 F.3d at 1032-1033. In order to sustain a defense under Section 547, each of the elements of Section 547(c)(2) must be met and therefore there is no basis to assert that the Tenth Circuit's decision is inconsistent with existing authority on the issue or is an incorrect interpretation simply because the Tenth Circuit resolved the issue on Balcor's inability to satisfy the Section 547(c)(2)(C) requirement.

In sum, the Tenth Circuit's decision is consistent with the policies of the preference provisions to promote equal treatment of creditors. Each of the Circuits have held that the "ordinary business terms" provision does not extend

to practices which are unusual or which do not promote the policies of the preference section. Further the Circuit decisions acknowledge the defense involves a peculiarly factual determination for which a bright line interpretation is inappropriate. Whether the phrase "ordinary" is defined to mean normal in the case of struggling debtors or the type utilized in healthy relationships, where no undue pressure is asserted by the creditor, the Court would have concluded that Balcor failed to meet its burden of proof. Balcor has not set forth special and important reasons that this Court grant the petition for writ of certiorari.

II.

THE DECISION BELOW IS CONSISTENT WITH *BARNHILL V. JOHNSON*

The Tenth Circuit's decision is consistent with *Barnhill v. Johnson*, ___ U.S. ___, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992). In *Barnhill v. Johnson*, this Court simply stated:

> These sections are designed to encourage creditors to continue to deal with troubled debtors on normal business terms by obviating any worry that a subsequent bankruptcy filing might require the creditor to disgorge as a preference an earlier received payment.

112 S.Ct. at 1391.

There is no basis to support Balcor's premise that the Tenth Circuit's decision is inconsistent with this Court's decision in *Barnhill v. Johnson*. Both cases hold that the ordinary course of business defense is available to a creditor who deals with struggling debtors on normal

business terms, terms which are not inconsistent with the policies behind the preference section. There is no support for Balcor's arguments that in *Barnhill v. Johnson* that this Court held that provisions which favor a creditor and provide special treatment will be in the ordinary course of business provided creditors dealing with troubled debtors would utilize such a provision. The ordinary course of business provision is a protection for relationships which do not impede the policies of the Bankruptcy Code to promote equality of treatment for creditors not a safe harbor for creditors who require disparate and inequitable treatment as a "cost" of continuing to do business with a struggling debtor. The Tenth Circuit's decision promotes the policies behind the preference provisions and is consistent with the legislative history. The Tenth Circuit's decision does not discourage creditors from dealing with struggling debtors. It simply provides that if creditors impose economic constraints upon the debtor and utilize provisions conveying control and favoritism to the creditor, that payments made to that creditor will not be protected by the ordinary course of business defense.

CONCLUSION

Balcor has not set forth any special and important reasons for this Court to grant the Petition for Writ of Certiorari. In order to establish a perceived conflict between the Circuits, Balcor disregards the substance of the Tenth Circuit's decision and relies on an isolated

statement taken out of context. The Tenth Circuit recognized that terms used in healthy debtor/creditor relationships do not raise the danger that the preference section seeks to avoid, namely inequitable treatment of creditors. The Tenth Circuit did not limit the availability of the ordinary course of business defense to healthy relationships but rather held that terms which are not utilized in healthy relations require scrutiny and will not meet the requirements of 11 U.S.C. § 547(c)(2)(C) unless it is established that the terms do not conflict with the policies of the preference section and do not confer an undue advantage upon the creditor.

The Tenth Circuit's decision is consistent with the policies of the preference section as set forth in the legislative history and is not in conflict with the circuit court decisions set forth above. The ordinary course of business defense involves issues which are predominantly factual. In this case, the Tenth Circuit concluded that the factual findings were not clearly erroneous and that under the escrow agreements Balcor had the ability, which it utilized, to favor itself over other creditors. Based on these conclusions, whether the terms were analyzed in the context of terms utilized in similar, even extraordinary situations, or terms utilized in usual or ordinary situations, the Court would have reached the conclusion that Balcor failed to meet its burden of proof under 11 U.S.C. § 547(c)(2).

The Tenth Circuit's decision is consistent with the policies behind the preference section and this Court's decision in *Barnhill v. Johnson*, ___ U.S. ___, 112 S. Ct. 1386, 118 L. Ed.2d. 39 (1992). The ordinary course of

business defense is a protection for debtor/creditor relationships which do not impede the policies of the Bankruptcy Code. The purpose of the ordinary course of business defense is not to provide a safe harbor for creditors who require disparate and inequitable treatment as a "cost" of continuing to conduct business with a struggling debtor. There is no special and important reason for this Court to grant certiorari, and we respectfully request the Court deny Balcor's Petition for Writ of Certiorari.

Respectfully submitted,

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